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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-

75-5262

ERNEST RAY SIMMONS,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH
CAROLINA

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH
CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on April 14, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at __N.C.__, 213 S.E.2d 280 (1975), and is set out in Appendix A hereto, pp. 1a-12a, infra.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on April 14, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the exclusion for cause of three veniremen on the grounds of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

3. Whether the admission of a law enforcement officer's recapitulation of petitioner's oral confessions, when this recapitulation was partially based upon the officer's recollection of a composite story related by both petitioner and a co-defendant (who did not testify at petitioner's trial) and partially upon petitioner's apparent acquiescence in the statements of his co-defendant, violated petitioner's right to be confronted with the witnesses against him, guaranteed by the Sixth Amendment to the Constitution of the United States, to be free from compulsory self-incrimination, guaranteed by the Fifth Amendment and to be afforded due process of law, guaranteed by the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> §14-17 (repl. vol. 1969): "Murder in the first and second degree defined; punishment.--A murder which shall be perpetrated by means of poison, lying in

wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." 1/

§15-187 (repl. vol. 1975): "Death by administration of lethal gas.--Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."

§15-188 (repl. vol. 1975): "Manner and place of execution.--The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on

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1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

April 14, 1975, affirming petitioner's conviction and sentence of death. Petitioner, Ernest Ray Simmons, an indigent black male, was sentenced to death in the Nash County Superior Court on June 13, 1974, upon conviction for the first degree murder of Mrs. Mary C. Powell, a white female. 2/

2/ .Petitioner's sentence of death was imposed under N.C. Gen. Stat. §14-17 (repl. vol. 1969) (murder) as construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature subsequently enacted a statue, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974), effective April 8, 1974, which slightly altered the definition of first degree murder. The new first degree murder statute, now codified as N.C. Gen. Stat. §14-17 (1974 supp.), provides:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

The 1974 legislation, however, is not involved in this case. For the North Carolina Supreme Court has expressly held, with three Justices dissenting, that the enactment of that legislation did not affect death sentences imposed under the anterior State v. Waddell procedure. State v. Williams, __N.C.__, 212 S.E.2d 113, 119-120 (1975) (affirming a death sentence for rape). Subsequent to its Williams opinion, the court has affirmed death sentences imposed for first degree murders committed before April 8, 1974, with Chief Justice Sharp dissenting on the grounds expressed in her dissent in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 747-750 (1974), and with Mr. Justice Copeland and Mr. Justice Exum dissenting on the grounds expressed in their dissents in State v. Williams, __N.C.__, 212 S.E.2d 113, 121-123 (1975). See, e.g., State v. Wetmore, N.C. Sup. Ct. No. 47 (Rowan County, Spring Term 1975) (June 6, 1975); State v. Young, N.C. Sup. Ct. No. 46 (Mecklenburg County, Spring Term 1975) (June 6, 1975).

Petitioner was indicted on January 28, 1974, for the murder of Mrs. Powell "in the perpetration of the felony crime of burglary and the attempted perpetration of the felony crime of robbery." [3] R. 3. The last person to see the 85 year old Mrs. Powell alive was a neighbor who had cut wood and set it on her front porch; he saw her at 5:00 p.m., December 13. R. 34. Another neighbor had been in her farmyard at 9:00 a.m., December 14, to cut wood but had not seen her. R. 42. A motorist recalled passing Mrs. Powell's house between 8:00 p.m. and 9:30 p.m., December 13, and seeing a parked car fifteen to twenty feet off the road in a driveway not far from Mrs. Powell's driveway. R. 44-45. Two other passersby also noticed a car in this driveway at approximately 9:00 p.m. R. 46, 49. [4] None of these witnesses saw anyone in or near this parked car. A neighbor who drove by Mrs. Powell's house between 11:00 p.m. and 12:00 p.m. the next night, December 14, remarked that the house was "all lit up." R. 43.

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[3] The jury was instructed, however, that:

> "If you are satisfied beyond a reasonable doubt that the defendant Ernest Ray Simmons, while either in the course of an attempted armed robbery or while comitting a burglary and that either of these proximately caused the death of Mary C. Powell [sic], it would be your duty to return a verdict of guilty of murder in the first degree."

R. 168 (emphasis added).

[4] The lone motorist described the parked car as "[s]omething like a '68 or '69 Roadrunner, orange with a light top . . . . [with] fluorescent stripes going down the sides of the car."

Mrs. Powell's dead body was discovered lying on the floor of the Powell home by a neighbor at 8:00 a.m., December 15, 1973; death had been caused by blood loss due to a shotgun wound in the right buttock, R. 51. A pathologist concluded that Mrs. Powell had been dead for at least one day at the time of the December 16 autopsy, and perhaps as many as two or three days. R. 53. Investigators discovered a hole "about the size of a quarter or just a mite larger," R. 57, in one of the glass panes of the front door. There was glass on the floor of the front room, and Mrs. Powell's body was lying by the fireplace in this room. The wadding from a .12 gauge shotgun shell was discovered approximately six to eight feet from the body, and a spent blue .12 gauge Remington Peters Victory shotgun shell [5/] was found on the driveway about 150 feet from the house, R. 58, 73, 141. Several rooms of the house had been ransacked: drawers had been

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4 / cont'd.

R. 44. Also, the rear end of the automobile "might have been raised up just a little." Ibid. The other driver testified that "it looked like a Roadrunner to me and it was jacked up behind . . . . The car was sort of an orange color and [sic] a beige top." R. 46-47. This motorist's passenger described the parked car as "an orange Roadrunner with a beige looking top, beige streaks on the side and it was jacked up behind." R. 49.

5 / The investigator who found this described it as a "very common brand" of shell: "people hunt on the farm all the time." R. 59.

opened, a metal chest had been uncovered, and papers had been strewn on the floor. R. 69-70. A December 14, 1973, newspaper was discovered in the mailbox, and check stubs were found in the kitchen with dates as late as December 13. R. 77-78.

The chief evidence against petitioner was a series of three oral confessions which he made to Sheriff Glenn Womble, who testified that he warned petitioner of his constitutional right to silence and to the assistance of counsel on each occasion before interrogation and that petitioner orally waived these rights each time. Sheriff Womble recapitulated petitioner's December 20, 1973, confession from memory:

> "He [petitioner] told me that he went to Martha Jones'. That Frank James Silver [6/] came to Martha Jones', brought his wife, his sister and his brother. That he -- and that Simmons [petitioner] and Silver left on [sic] Silver's car and went out to Mrs. Powell's home, drove by the house, parked on the right-hand side of the road, got down, walked across the highway, climb over a fence, walked through a lot -- and she had a fence running parallel with the north driveway -- they climb over the fence there. When they climb over the fence there, Silver stayed there. Simmons went up

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6/ Frank James Silver was also indicted and tried for the murder of Mrs. Powell, and at a separate trial from petitioner's, he was found guilty of first-degree murder and sentenced to death. The North Carolina Supreme Court reversed this conviction on the ground that the trial court had admitted Silver's December 22, 1973, confession without properly determining whether it had been tainted by a possibly involuntary confession on December 20. State v. Silver, __N.C.__, 213 S.E.2d 247 (1975).

to the house, walked around the house, stepped up on the back step to the back porch, looked in the TV room and said that she was looking at TV and said she had a big dog in there. He left, came back and told Silver that she was looking at TV but said she had a dog in there, a big dog in there, and he wasn't going in there without a gun; and they got on -- they went back to the car, got on [sic] the car and went back to Martha Jones' home to get Simmons' gun. Simmons said that Martha wouldn't let him have it, didn't want him to take it, so he asked Silver if he knew where he could get a gun and said that Silver said, 'Come on.' Said they went to Driver's store, Silver went in and bought four shells, it was raining, Simmons set in the car. Said they got in the car and went to Silver's father's home -- which Silver was living there [sic] with his father, out on 43 -- drove up to the house and both of them went in the house, went to the front bedroom on the left, raised the mattress up and got a single barrell [sic] -- this single barrel shotgun here -- from under the bed, and they left and went back to Mrs. Powell's but they stopped this time just before they got to her house.

They pulled up in a driveway at an old abandoned house on the right-hand side of the road going toward Hickory -- which would be on the opposite side of the road from Mrs. Powell's home. They walked down the highway to the south drive. It is a circular drive that goes up in her house, they call it the south drive and the north, it circles all the way round and comes back out. Simmons said they walked up the drive, they got just a few steps up from the highway, that Silver was loading the gun and said it went off. He unbreeched it, a shell flew out. Simmons said that both of them looked for the shell, that Silver struck some matches and they both looked until Mrs. Powell -- he said the lights was on at her house and they saw her come to the front door and looked out the window and they left, walked back up the highway toward where the car was parked -- and there's another drive that turns to the right, goes down to Almeta Mills' home.

They walked down that drive, crawled over the fence, walked through the pasture, came up to her south drive right in the front of the car shed -- that's a little water pump house there. They climb over the fence right there. Simmons said he was in

the front, Silver was behind him and Silver had the gun, walked to the back porch step, stepped up on the step, looked in the TV room and did not see her, walked around the back of the house, around to her bedroom window on the north side of the house, looked in the bedroom window, did not see her; walked on around to the front of the house, Simmons still in the front, Silver right behind him.

Simmons said he stepped up on the front porch and that Silver was on the step right behind him. Said when he stepped up on the porch he stepped back and told Silver that she was poking in the fire. He stepped back on the step, Silver stepped up on the porch and shot her. He said then that he was wearing gloves and Silver did not have on any gloves. The he opened the front door, it wasn't locked, taken hold of it and went in. Said Mrs. Powell was lying in front of the fireplace on her back with her face up and said that she was breathing but she never moved or never spoke.

That he went into the bedroom to the left, searched through some drawers in there and came back out in the room that she was in and he and Silver both went into the den, looked through the den -- that's where the TV was that they called the TV room -- walked down a little hallway by the bathroom, went into her bedroom. Simmons said he pulled the little drawer open to the night table setting besides of her bed; that Silver reached down in there, picked up this little .25 automatic, put it in his pocket. Simmons said he picked up a box that had some 50¢ pieces in it and he gave the 50¢ pieces to Silver. Silver put them in his pocket. Then Silver went back in the room where Mrs. Powell was, and then he got a metal box out of her closet, looked through the metal box. Told me he didn't remember getting anything out of the metal box.

> He went into the front bedroom then, looked through things in there and didn't get anything in there, walked back into the room where Mrs. Powell and Silver was, went back in the room to the left, the first room they went in and he got this double barrel shotgun and this rifle. Said he came out, came out into the room where they were, that he and Silver both went out the front door, walked around the house to the car shed, went under the shelter where the car was, opened the door, looked through the car, looked through the pocket of the car and all and said they did not find anything there, and he left and went back down the south drive and on back to the car, got in the car and left, went back to Silver's home, put the gun -- both of them went in the house, put the gun back under the mattress in the front bedroom and left there, went to his house and before he got to his house that Silver had two shells, that he gave him the two shells; he put them in the shotgun and left the shotgun and the rifle at his home.
>
> He left the shotgun and the rifle at Simmons' home, carried them back to Simmons' home, left that. Then he and Silver left there and went down to Martha Jones' home and that Silver got his wife, his sister and his brother and left and said he left in a few minutes and walked back to his home."

R. 103-106. Sheriff Womble testified that the next day, December 21, in the presence of Frank James Silver, petitioner "made the same statement" as he had made on December 20. R. 107. On December 22, petitioner requested the police to allow him to "re-run the route" he and Silver had taken on December 13, and during this journey, he gave a rambling statement that conformed with his December 20 confession. R. 108-113. 7/

7/ After a hearing conducted outside the presence of the jury, the trial court ruled all three of these statements admissible:

> "All right. Let the record show then at the end of the voir dire hearing, the Court finds as a fact that on the dates of December 20, 21,

On cross-examination Sheriff Womble testified that he had made notes during the various interviews with petitioner and Silver which, while "not verbatim," reflected everything "material" that the two men said. R. 121.

When defense counsel was permitted to read these notes, it was determined that only one entry, for December 20, referred to petitioner. In its entirety, this entry read:

> "'December 20, 1973, Ernest Ray Silver [sic], black male, 37, route five, Rocky Mount. I got with Frank Silver at Martha Jones' house. We went to Raeford Drug, got one-fifth of wine, then went to my house and dranked a little white whiskey. I did not drink quite a half a pint. Frank drank a little. Frank said, 'Come on, Jet's go get some shells.' We went to Driver's store. Frank went in and got four shells. We then went to Frank's house, got a single barrel shotgun from under the bed in the left front room. We then went to Powell's house. Frank stepped up on the front porch and shot her. Frank [sic] said Ernest shot her --'".

R. 123. Sheriff Womble admitted that his notes reflected a

7/ cont'd.

> 22, 1973, at the time of questioning the defendant that Glenn O. Womble, Sheriff of Nash County, before receiving any statement from the defendant, fully advised him of his right to remain silent [sic]; his right to have counsel represent him; his right to have the State pay for counsel if he could not afford counsel and warned him of his possible self-incrimination. That the defendant fully understood these rights; that he freely, voluntarily and understandingly waived his right to remain silent and to have counsel present at any questioning. Any statements the defendant made to the sheriff, Glenn O. Womble, on December 20, 21 and 22, 1973 are admissible in evidence. The defendant's objections to these questions are overruled."

R. 102-103.

composite story given by both petitioner and Silver:

> "On the 22nd, at their request, Frank Silver and Ernest Ray Simmons re-ran the route. They sat there and told me their stories together and one told one part and another one part . . . .
>
> When I said 'they' they both agreed on what I wrote. If they hadn't, I would have done just like I did over here, so and so said so and so and he denied it, said that he didn't remember it.
>
> They saw me write it down, that is what I mean they both agreed. No, sir, they didn't read it. I wrote down exactly what they said."

R. 127, 130. Except for the facts in the December 20 entry relating specifically to petitioner, the Sheriff conceded that "the rest of [what he testified petitioner said] . . . is conglomerated in with [what] Frank James Silver" said. R. 130.

Ms. Martha Jones testified that one night in December, 1973, petitioner came to her house and requested his shotgun, which was in her possession. Shortly thereafter, Frank James Silver arrived in a car with a "red body and white top," R. 65, and the two men left together. An hour later, they returned, and petitioner again asked for his shotgun, but Ms. Jones refused to give it to him because "[h]e had been drinking" and "he acts funny when he drinks." R. 66. A country storekeeper sold Silver four .12 gauge "Peter Victory," R. 68, shotgun shells on the night of December 13, 1973; he did not see petitioner on this occasion.

The police retrieved a chrome-plated .25 caliber Galese automatic pistol with a simulated pearl handle from a gun dealer who had purchased the weapon from Frank James Silver on December 18 for $32.00, R. 61; Silver had originally tried to sell this pistol to him at 1:00 p.m., December 14, for $40.00, R. 60. A friend of Mrs. Powell's testified that five years earlier

he had bought a pistol for her that was "similar" to this handgun, but he "could not say whether that is the same pistol or not." R. 56. Approximately a year before her death, a deputy sheriff had cleaned Mrs. Powell's pistol for her, and it was "identical" to the weapon the police obtained from the gun dealer. R. 64. 8/

The State introduced a .12 gauge single-barrel shotgun which the police obtained from Frank James Silver's father. R. 113. Sheriff Womble testified that petitioner had told him this was the shotgun that Silver had carried on the night of December 13. R. 113. In the opinion of a ballistics expert who test fired this shotgun, the .12 gauge shotgun shell found on Mrs. Powell's driveway had been fired by this weapon. R. 147. This expert also testified that the wadding found near Mrs. Powell's body was the kind that Remington-Peters uses in its shotgun shells. 9/

8/ Mrs. Powell's cleaning woman testified that the pistol retrieved by the police "kind of look like," Mrs. Powell's pistol, though the woman had only seen this weapon "glancing" at it while cleaning: "I never, you know, just paid close attention to it." R. 38.

9/ The State also introduced a sixteen-shot bolt action rifle and a .12 gauge double-barrel shotgun which were seized at petitioner's house on December 20 when he was arrested. R. 113. Sheriff Womble testified that petitioner told him he had taken these weapons from Mrs. Powell's home on the night of December 13. R. 114. There were two Victory .12 gauge shells in the shotgun, and petitioner told the Sheriff that Frank James Silver had given him these shells on December 13. Ibid. Mrs. Powell's cleaning woman testified that these two weapons "kind of looks like" a rifle and shotgun she had seen in Mrs. Powell's home, although she said she "ain't too sure" of her opinion. R. 38.

During the selection of the jury at petitioner's trial, the veniremen were examined regarding their attitudes toward capital punishment, and three were excluded over petitioner's objection on the basis of their conscientious or religious scruples concerning the death penalty. R. 24, 31, 32, 34. At the close of the evidence,[10/] the jury was instructed that it could find petitioner either guilty of first degree murder or not guilty, R. 167-168. A verdict of guilty was returned, and the trial court thereupon sentenced petitioner to death. R. 169.

On April 14, 1975, the Supreme Court of North Carolina affirmed petitioner's conviction and death sentence, with three Justices dissenting in regard to the death penalty. On April 28, 1975, Chief Justice Sharp stayed execution of the judgment in order to allow a petition for writ of certiorari to be filed in this Court. On July 3, 1975, Mr. Justice White granted an extension of time until August 12, 1975, in which to file a petition for certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner excepted to the trial court's order sentencing him to death. R. 169. Petitioner's Assignment of Error No. 23, on his appeal to the Supreme Court of North Carolina, asserted as error:

> "The action of the Court as set out in Exception No. 67 (R p 169) in ordering the death penalty in violation of the rights as guaranteed by the Constitution of the United

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10/ Petitioner presented no evidence.

States and the State of North Carolina."

A majority of the North Carolina Supreme Court rejected this claim:

> "Defendant assigns as error the entry of the judgment of death and presents the contention that the death penalty as imposed in North Carolina violates the principles of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. All of the contentions which defendant presents under this assignment of error have been considered and rejected by this Court in numerous recent cases. See, e.g., State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106; State v. Avery, supra; State v. Williams, 286 N.C. 422, 212 S.E.2d 113; State v. Sparks, 285 N.C. 631, 207 S.E.2d 712; State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844; State v. Fowler, 285 N.C. 90, 203 S.E.2d 803; State v. Dillard, 285 N.C. 72, 203 S.E.2d 6; State v. Noell, supra; State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721; State v. Waddell, 282 N.C. 431, 194 S.E.2d 19. On the authority of these cases, this assignment of error is overruled."

State v. Simmons, __N.C.__, 213 S.E.2d 280, 291; App. A, infra, at 12a.

II. After three veniremen had been excluded over objection on account of their conscientious or religious scruples against the death penalty, petitioner's counsel stated: "I would like to have put in the record an objection to the Court excusing for cause jurors who expressed a view against capital punishment." R. 34. Petitioner's Assignments of Error No. 4 and No. 5 asserted as error:

> "4. The action of the Court as set out in Exception No.6 (R p 24), in removing a juror for cause on the Court's own motion because the juror expressed a view against capital punishment.
>
> 5. The action of the Court as set out in Exception No. 10 (R p 30), Exception No. 11 (R p 31), Exception NO. 13 (R p 32), and Exception No. 17 (R p 34), in removing a juror for cause when he expressed a view against capital punishment."

The North Carolina Supreme Court rejected these claims:

> "We hold that, when considered contextually, the answers of the prospective Juror Dozier reveal that she could not vote for a verdict of guilty in this capital case even though the State might have proved to her by evidence beyond a reasonable doubt that defendant was guilty as charged. We note that the record fails to show that defendant exhausted his peremptory challenges.
>
> The only argument brought forward in defendant's brief concerning removal of jurors from the panel relates to Juror Dozier. We have nevertheless carefully examined the exceptions as to the removal of other jurors and find no error prejudicial to defendant."

State v. Simmons, __N.C.__, 213 S.E.2d 280, 286 (1975); App. A, infra, at 7a.

III. At the close of the State's evidence, petitioner's counsel moved:

> "[t]o strike all the testimony of the Sheriff as to the confession of the defendant on the ground it is a composite, that his confession is based on a composite story told by two people and not directly from the defendant, Ernest Ray Simmons."

R. 140. This motion was denied. Ibid. Petitioner's Assignment of Error No. 10 asserted that the trial court had erred in finding his confession voluntary, and Assignment No. 16 asserted as error:

> "The action of the Court as set out in Exception No. 49 (R p 148) in allowing into evidence a confession based on a composite story."

In his brief, petitioner argued at length that the trial court had committed reversible error by "allowing into evidence a confession based on a composite story and finding that it was voluntary." Brief of Appellant at 10; see id. at 10-14. The North Carolina Supreme Court found that petitioner's custodial

statements were voluntarily made, State v. Simmons, __N.C.__, 213 S.E.2d 280, 288 (1975); App. A, infra, at 9a, and it implicitly rejected petitioner's claim that the confessions were erroneously admitted because they were "composite" products of two men's statements when it ruled the confessions admissible.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at 11-51 (attached as Appendix B, infra). On October 29, 1974, this Court granted certiorari to consider a similar question in Fowler v. North Carolina, No. 73-7031.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF THREE VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The record below presents important issues concerning the constitutionality of excluding persons who oppose capital punishment from service on trial juries in capital cases tried under a purportedly "mandatory" death-sentencing procedure. Notwithstanding Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court of North Carolina here upheld the exclusion of three veniremen 11/ for cause, over objection, on account of

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11/ Veniremen Dozier, Sharpe, and Kennedy were excluded on the basis of the following voir dire examination.

> "Q. [Assistant District Attorney] Mrs. Dozier, do you have any moral or religious scruples or beliefs against capital punishment?
> A. Yes, I don't believe in killing.
>
> Q. On account of your beliefs about capital punishment, would it be impossible under any circumstances and in any event for you to return a verdict of guilty as charged, even though the State were to prove the defendant's guilt beyond a reasonable doubt? I am asking would you be able to return a verdict of guilty if we satisfied you that the defendant was guilty and satisfied you from the evidence and beyond a reasonable doubt, knowing that upon that verdict the defendant would be sentenced to die in the gas chamber--would you be able to return a verdict of guilty under those circumstances?

their conscientious or religious scruples against the death

11/ [Cont'd]

"JUROR DOZIER: I don't understand you.

Q. You told me you did not believe in the death penalty and in killing?

A. Yes.

Q. I ask you with that belief would it be impossible for you to find the defendant guilty, if the State satisfied you from the evidence and beyond a reasonable doubt that he is guilty--if the State proved his guilt beyond a reasonable doubt, would it be impossible for you to return a verdict of guilty, knowing he would be sentenced to die in the gas chamber?

A. I don't know what to say there, to tell the truth.

THE COURT: As I understand it, you say you do not believe in capital punishment?

A. Yes, sir.

THE COURT: Even though the State's evidence satisfied you or all the evidence satisfied you beyond a reasonable doubt that the defendant is guilty, would it be impossible for you to return a verdict of guilty knowing that if you did so the defendant would be sentenced to die in the gas chamber--do you understand my question?

A. (No answer).

THE COURT: Well, let me phrase it another way. If you should be satisfied from the evidence beyond a reasonable doubt that the defendant was guilty, would you find him guilty in this case?

A. No.

THE COURT: You would not? And is the reason you would not be[sic]because you would know that would cause him to be sentenced to die in the gas chamber? Do you understand the question?

A. No, not definite I don't.

THE COURT: Well, as I understood it, you said that even though all the evidence convinced you beyond a reasonable doubt that the defendant was guilty, you would not find him guilty. Is that the way you answered the question?

A. That is the way I understood it.

THE COURT: Well, is that the way you meant to answer it-- you would find the defendant not guilty

penalty: "even though a prospective juror's voir dire answers

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11/ [Cont'd]

"even though all the evidence convinced you beyond a reasonable doubt that he was guilty? I am not trying to put words in your mouth, I just want to know if that is the way you answered that question? Do you understand my question to you? You understand that you are going to be called on as a juror, once the evidence is in, to return to the jury room and then vote as to whether this defendant is guilty or not guilty. Do you understand that?

A. Yes, I understand that.

THE COURT: You understand that is what your function as a juror will be?

A. Yes.

THE COURT: That is what your duty as a juror will be. Do you understand that?

A. Yes, I understand that but I don't know.

THE COURT: If all the evidence convinced you beyond a reasonable doubt that the defendant was guilty of first degree murder, would you vote for a verdict of guilty of first degree murder--do you understand that question? If you were convinced after hearing all the evidence [,] if you were convinced beyond a reasonable doubt that the defendant was guilty of first degree murder, whatwould you vote for? Would you vote for guilty or not guilty?

A. I would vote for not guilty.

THE COURT: And is the reason you would vote for not guilty is because you would know if you voted for a verdict of guilty, if the defendant were found guilty, what the sentence would be, that is that he would be sentenced to die in the gas chamber--is that the reason you would vote for not guilty, even though you were convinced beyond a reasonable doubt that he was guilty?

A. (No answer.)

THE COURT: All right. Well, the Court will excuse you from the trial of this case then. Thank you.

MR. BENSON: On what grounds?

THE COURT: I am excusing her in the discretion of the Court. I am excusing her as a juror."

R. 22-24.

"Q. [Assistant District Attorney] Are you telling

to questions concerning his beliefs as to capital punishment

11/ [Cont'd]

"us in this case if on your verdict the defendant had to be sentenced to die in the gas chamber you would automatically vote against or vote for a verdict of not guilty, regardless of what the evidence was in the trial of this case?

OBJECTION OVERRULED...

A. [Veniremen Sharpe] I don't think I would be able to sit through it. I been on a murder case. I just don't think I would be able to sit in another one.

Q. You say you have sat on a murder case?

A. On a jury, boys got murdered up on city lake here in Rocky Mount. I don't believe I could stand to face another one.

Q. You understand in this case if the jury should return a verdict of guilty of murder in the first degree, it would be the duty of the Court to sentence the defendant to die in the gas chamber--I am going to ask you on account of your feelings about capital punishment would it be impossible for you to return a verdict of guilty as charged even though the State had satisfied you from the evidence and beyond a reasonable doubt the defendant was guilty, if you knew he would be sentenced to die in the gas chamber?

OBJECTION OVERRULED

A. I still don't think I could face it.

Q. Are you saying you could not return that verdict?

A. That is what I am saying. I cannot.

MR. BROWN: Challenge by the State for cause.

THE COURT: I understand Mrs. Sharpe, you feel like you could not return a verdict of guilty no matter what the evidence showed because of your feelings against capital punishment?

JUROR SHARPE: Right.

THE COURT: The Court will excuse you from the trial of this case."

R. 30-31.

"Q. [Assistant District Attorney] Do you have any moral or religious scruples or beliefs against capital punishment?

A. [Veniremen Kennedy] I just don't believe in it.

may be equivocal and not models of clarity, it is proper for the trial judge to excuse the juror for cause when a contextual consideration of the entire voir dire examination indicates that the juror could not vote for a verdict which would result in the imposition of the death penalty." State v. Simmons, ____ N.C. ____, 213 S.E.2d 280, 286 (1975); App. A, infra, at 7a. That holding presents issues of general significance which should be determined by this Court.

11/ [Cont'd]

"Q. On account of your beliefs would it be impossible for you to return a verdict of guilty of murder in the first degree, regardless of what the evidence was?

OBJECTION OVERRULED

A. Yes.

Q. It would be impossible?

A. Yes.

MR. BROWN: The State challenges for cause.

THE COURT: As I understand it, you say it will be impossible for you to return a verdict of guilty in this case no matter what the evidence is since you know what the punishment imposed would be?

JUROR KENNEDY: Yes.

THE COURT: Your answer to that is 'yes'?

JUROR KENNEDY: Yes.

THE COURT: The Court will excuse you from the trial of this case."

R. 32. Petitioner objected to each of these exclusions. R. 34.

A. The Test of Exclusion Applied by The Court Below Did Not Meet the Minimum Standards Required by The Constitution As Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968).

These exclusions were error under Witherspoon v. Illinois, 391 U.S. 510 (1968), because that decision established in capital cases a clear and unequivocal prohibition against excluding veniremen for cause on account of their conscientious or religious scruples against the death penalty except under narrow and carefully defined circumstances:

> "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

391 U.S. at 522 (footnote omitted). See also Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478, 482 (1969); Mathis v. New Jersey, and companion cases, 403 U.S. 946-948 (1971); Marion v. Peto, 434 F.2d 29, 32 (CA5 1970); Novila v. State, Texas Ct. Crim. App. No. 49, 396 (April 30, 1975). Exclusions for cause are to be countenanced only where veniremen make "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S.

at 522 n.21 (emphasis in original).

First, the North Carolina Supreme Court approved a test for exclusion which is clearly erroneous and which has been rejected by this Court on a number of occasions. The court below ruled that a for-cause exclusion would be upheld if, despite specific responses, "a contextual consideration of the entire voir dire examination indicates that the juror could not vote for a verdict which would result in the imposition of the death penalty." State v. Simmons, ___ N.C. ___, 213 S.E.2d 280, 286 (1975); App. A, infra, at 7a. This Court has consistently reversed holdings that exclusion of death-scrupled veniremen may be upheld on the basis of "the context of the entire voir dire examinations," People v. Speck, 41 Ill.2d 177, 242 N.E.2d 208, 227 (1968), rev'd per cur. sub nom. Speck v. Illinois, 403 U.S. 946 (1971) [12]; of "the totality of the trial court's treatment of the subject," State v. Mathis, 52 N.J. 238, 245 A.2d 20, 27 (1968), rev'd per cur. sub nom. Mathis v. New Jersey, 403 U.S. 946 (1971); of the entire "atmosphere of the proceedings," Daggers v. Commonwealth, 439 S.W.2d 580, 585 (Ky. Ct. App. 1968), rev'd per cur. sub nom. Daggers v. Kentucky,

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12/ The Illinois Supreme Court had also ruled that although "not every juror who was excused for-cause because of his objections to capital punishment was specifically asked whether he would never impose the death sentence or would refuse to consider its imposition [,] . . . we must look . . . to the atmosphere of the proceeding." People v. Speck, supra, 242 N.E.2d at 226.

403 U.S. 946 (1971); or "of the total record of the voir dire proceedings," State v. Adams, 76 Wash.2d 650, 458 P.2d 558, 576 (1969), rev'd per cur. sub nom. Adams v. Washington. See also Harris v. Texas, 403 U.S. 947 (1971), rev'g 457 S.W.2d 903 (Tex. Ct. Crim. App. 1970) (sub nom. Harris v. State). Application of such a test, particularly in the case of a veniremen such as Mrs. Dozier, see note 11, supra, whose feelings about the death penalty are equivocal, ignores the individual nuances of expression which may indicate that a juror who has conscientious scruples against the death penalty may nevertheless be able to consider a capital verdict.

Second, the exclusion of Veniremen Dozier[13] was in flat violation of the Witherspoon requirement that a veniremen may not be excluded for "voic[ing] general objections to the death penalty or express[ing] conscientious or religious scruples against its infliction." Witherspoon v. Illinois, supra, 391 U.S. at 522.

13/ Although the State did not move to excuse Veniremen Dozier, the North Carolina Supreme Court correctly held that she was excluded for cause, over defense objection, on account of her capital punishment scruples: "Although there was no formal challenge of Juror Dozier by the State and the trial judge stated that he excused the juror 'in the discretion of the Court,' it is obvious from the circumstances disclosed by the record that the juror was excused because of her expressed scruples against capital punishment." State v. Simmons, ____ N.C. ____, 213 S.E.2d 280, 285-286 (1975); App. A, infra, at 6a-7a. See note 11, supra.

Mrs. Dozier stated that she "did not believe in the death penalty and in killing," and that she "[did] not believe in capital punishment." R. 22. When pressed to state whether she could return a guilty verdict knowing that the death penalty would subsequently be imposed, she candidly replied "I don't know what to say there, to tell the truth," R. 22, and "I understand that [her duty as a juror] but I don't know [whether she could return a first degree murder verdict]," R. 23. Although Mrs. Dozier was finally compelled to indicate (by her silence, see R. 24) that she could not return a death verdict, her feelings were clearly equivocal. She was pressured into the premature resolution of a difficult issue as to which she felt great uncertainty. Veniremen "cannot be excluded for cause simply because there are some kinds of cases in which they would refuse" to return a capital verdict. Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21. Moreover, "a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." Ibid. The questioning of Veniremen Dozier by the Assistant District Attorney and the trial court was not directed at determining whether she could consider a first degree murder verdict but rather whether she could impose the death penalty in this case. This was clearly erroneous.

Finally, the death penalty scruples of these veniremen were not made "unmistakably clear," as required by Witherspoon. 391 U.S. at 522 n.21, since they were not instructed by the trial

court that it is the civic duty of each veniremen to sit as a juror if he possibly can. As the Court declared in Boulden v. Holman, supra, 394 U.S. at 483-484: "[i]t is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." A veniremen must be instructed that the law requires him to "subordinate his personal views to what he . . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, 391 U.S. at 514-515 n.7. Although some of the excluded veniremen here stated, without more, that they could not return a verdict which entailed the imposition of the death sentence, they were given no instruction on their duty to consider such a verdict or asked whether they could subordinate their initial instincts to the law of North Carolina that the trial court would charge them to obey.

B. The Exclusion of Veniremen with Conscientious Scruples Against Capital Punishment Deprived Petitioner of His Sixth Amendment Right to a Representative Jury.

In order to avoid subjecting the Court to redundant argument, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975) at 72-78 (attached as Appendix C, infra).

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION OF A LAW ENFORCEMENT OFFICER'S RECAPITULATION OF PETITIONER'S ORAL CONFESSIONS, WHEN THIS RECAPITULATION WAS PARTIALLY BASED UPON THE OFFICER'S RECOLLECTION OF A COMPOSITE STORY RELATED BY BOTH PETITIONER AND A CO-DEFENDANT (WHO DID NOT TESTIFY AT PETITIONER'S TRIAL) AND PARTIALLY UPON PETITIONER'S APPARENT ACQUIESCENCE IN THE STATEMENTS OF HIS CO-DEFENDANT, VIOLATED PETITIONER'S RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, TO BE FREE FROM COMPULSORY SELF-INCRIMINATION, GUARANTEED BY THE FIFTH AMENDMENT AND TO BE AFFORDED DUE PROCESS OF LAW, GUARANTEED BY THE FOURTEENTH AMENDMENT.

Although Sheriff Womble took notes of the "material" parts, R. 121, of the various statements[14/] which petitioner and Frank Jones Silver made with regard to the murder of Mrs. Powell, which

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14/ According to Sheriff Womble, petitioner was questioned alone on December 20; he and Silver were questioned together on December 21; and the two men were again questioned together on December 22, as they guided law enforcement officers over the route they said they had taken on December 13. R. 89, 93.

formed the basis of the Sheriff's trial testimony, an examination of these notes revealed that most of them were either statements made by Silver or what the Sheriff described as "conglomerated," R. 130, statements made by the two men "together," R. 127:[15] "They sat there and told me their stories together and one told one part and another one part." Ibid. The Sheriff stated that both men had "agreed" with what he had transcribed (whether this agreement was verbal or silent is not clear from the record), but he admitted that they had not read (or been told) what he had written down. R. 130. Many of the statements ascribed by the Sheriff to Silver directly incriminated petitioner: "The only difference in what they have said from start to finish is that Frank Gomon Silver at first said that this Ernest Ray Simmons is the man that done the shooting." R. 128.

Although the Sheriff testified that Silver was not present on December 20 when petitioner gave his confession, the notes cast grave doubt upon whether the Sheriff's narration of this December 20 confession was indeed based only on what petitioner told him on this date. For these eleven or twelve lines are captioned "Ernest Ray Silver," R. 123 (a combination of the names of both co-defendants), and close with the statement "Frank said Ernest shot her," ibid., clearly a notation of something Silver said. Moreover, the Sheriff's oral recapitulation omitted approximately a fourth of this entry; not until

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15/ Sheriff Womble also described his notes as a "compilation of both of their stories." R. 133.

the Sheriff's memory was refreshed by consulting his notes did he recall that petitioner had stated (according to the notes) on December 20: "We went to Raeford Drug, got one-fifth of wine, then went to my house and dranked [sic] a little white whiskey. I did not drink quite a half a pint. Frank drank a little." Ibid. In fact, the three confrontations with petitioner (one when he was alone and two when he was with Silver) appear to have merged in the Sheriff's mind: he described in detail petitioner's December 20 statement, R. 89-91, 103-106, but he declined to recapitulate the December 21 statement, merely asserting that "[h]e [petitioner] didn't tell me anything different. He went into a few more details on the 21st." R. 93. The Sheriff detailed petitioner's December 22 statement, R. 108-112, but this was admittedly "a compilation of both of their stories." R. 133.

Admission of these composite statements clearly denied petitioner his Sixth Amendment right to confront and cross-examine a key witness against him, for Frank James Silver did not testify at petitioner's trial. Silver's statements that petitioner had shot Mrs. Powell, R. 123, 128, were particularly damning in the absence of any chance to cross-examine Silver. 16/

16/ Although these statements of Silver were elicited on cross-examination by petitioner's counsel, this searching examination was necessitated by the presentation on direct examination of statements that were in fact a blend of what the two men had said. Petitioner's counsel was therefore compelled to attempt to determine what petitioner had said and what Silver had said.

Thus, there was a "substantial risk that the jury . . . looked to the incriminating extrajudicial statement [of Silver] in determining petitioner's guilt." Bruton v. United States, 391 U.S. 123, 126 (1968). Moreover, unlike in Bruton, there were no cautionary instructions to the jury to disregard the portion of the composite testimony admissible only against Silver.

Also, insofar as the composite confessions were a product simply of petitioner's apparent agreement with what Silver was telling the police, their admission violated petitioner's Fifth Amendment right to remain silent in the face of interrogation.

This Court has ruled that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial, the fact that he stood mute or claimed his privilege in the face of accusation." Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966). See also United States v. Hale, 43 U.S.L.W. 4806 (U.S., 1975). It is particularly reprehensible to allow petitioner's silence to be used against him in any way in the circumstances of these interrogations for the Miranda warning has been recognized as a significant factor in "deaden[ing] his [the accused's] natural inclination to speak out in his own defense," Miller v. Cox, 457 F.2d 700, 702 (CA4 1972).[17/]

17/ See United States ex rel. Staino v. Brierly, 387 F.2d 597, 600 (CA3 1967):

> ". . . one's normal response to hearing derogatory statements about himself is substantially inhibited by the very fact that

Finally, the admission of a composite confession in the circumstances of this case, where the record does not clearly disclose that petitioner himself made all the statements attributed to him, gives the State license to synthesize (perhaps unintentionally) evidence against him. It is well established that a prosecutor's "deliberate deception of court and jury" by the presentation of evidence which he knows to be false is a violation of the Due Process Clause. Mooney v. Holohan, 294 U.S. 103, 112 (1935). Accord: Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); White v. Ragen, 324 U.S. 760 (1945); Pyle v. Kansas, 317 U.S. 213 (1942). See also Mesarosh v. United States, 352 U.S. 1, 9 (1956). "[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." Miller v. Pate, 386 U.S. 1, 7 (1967). The procedures followed here are simply too unreliable to justify admission, as petitioner's confession, of the statements Sheriff Womble described and attributed to petitioner.

17/ cont'd.

> he is under arrest on a criminal charge and is being questioned by police officers in an obvious effort to substantiate that charge. On such an occasion a prisoner is likely to be wary and cautious."

The Court should grant review here to determine whether the State's use of this polyphonic confession violated petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments. The procedures followed by the police in this case have the potential for severe abuse. The State cannot constitutionally synthesize evidence against a criminal defendant.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

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75-5262

Appendix A

State v. Simmons, __N.C.__.
213 S.E.2d 280 (1975)

Stegmann, through counsel, promptly objected to the prosecutor's argument here complained of and moved for a mistrial. His objection was overruled and motion denied. No curative instructions were attempted. This constituted error, in my opinion, entitling defendant to a new trial.

The evidence in this case is sharply conflicting. The question of guilt hangs largely on the credibility which the jury accords to the prosecuting witness and to the defendant. I am unable to say that the improper character evidence and the improper portions of the State's closing argument constituted error which was harmless beyond a reasonable doubt.

I also dissent from the imposition of the death sentence for the reasons stated in my dissenting opinion in State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

STATE of North Carolina

v.

Ernest Ray STEPHENS.

No. 44.

Supreme Court of North Carolina.

April 14, 1975.

Defendant was convicted before the Superior Court, Nash County, John Webb, Special Judge, of murder in the first degree, with mandatory death sentence being imposed, and defendant appealed. The Supreme Court, Branch, J., held that trial judge did not err in questioning prospective jurors concerning their views as to capital punishment or by removing one juror because of her views concerning capital punishment, that mere technical violation by failing to require clerk to read names of jurors prior to impaneling jury was not prejudicial, that oral waiver of counsel prior to confession was effective, that evidence was sufficient to establish relevancy and identity of weapon, which was said to be similar to one owned by deceased, and thereby make it admissible, that although indictment charged murder in the perpetration of a felony of burglary and attempted robbery it was not prejudicial to instruct that jury could return verdict of guilty of murder in the first degree if they found that the killing was committed in the perpetration of either burglary or attempted robbery, that any error in instruction on intoxication as a defense was not prejudicial since it redounded in defendant's favor and that death penalty was properly imposed.

No error.

Sharp, C. J., dissented as to death sentence and filed statement; Copeland and Exum, JJ., dissented as to death sentence and filed statements.

1. Jury ⇐131(16)

Trial judge, in exercise of his duty to supervise and control the trial so as to insure a fair trial to all parties, has the right and duty to interrogate prospective jurors in order to clarify their answers concerning their beliefs as to capital punishment.

2. Jury ⇐79(3)

A defendant is not entitled to a jury of his choice but only to a jury selected pursuant to law and without unconstitutional discrimination against a class or substantial group of the community from which the jury panel is drawn; a defendant has no vested right to a particular juror.

3. Jury ⇐75(2)

In exercising his duty to see that a fair and impartial jury is empaneled, the trial judge, in his discretion, may in proper cases excuse a prospective juror without a challenge by other party.

4. Jury ⇐108

Even though a prospective juror's voir dire answers to questions concerning his belief as to capital punishment may be equivocal and not models of clarity, it is proper for the trial judge to excuse the juror for cause when a contextual consideration of the entire voir dire examination indicates that the juror could not vote for a verdict which would result in imposition of the death penalty.

5. Jury ⇐108

Prospective juror's affirmative response to voir dire inquiry whether she had any moral or religious scruples or beliefs against capital punishment, when combined with assurance that she would vote not guilty if all the evidence convinced her beyond a reasonable doubt that defendant was guilty of first-degree murder and her silence when asked whether reason she would vote not guilty was because of the death penalty, justified court's excusing juror because of her scruples against capital punishment.

6. Jury ⇐79(1)

Purpose of requiring the clerk to read the names of the jurors is to enable a defendant to exercise intelligently his right to challenge before the jury is impaneled. G.S. § 9-21.

7. Criminal Law ⇐1075(6), 1166.16

Although technical violation of rule occurred when trial court stood one juror at foot of panel and failed to have names of jurors read prior to impaneling jury, such violation was not prejudicial where defendant interposed no objection to the clerk's failure to read over the names of the jurors until after the jury was impaneled, any possible prejudice resulting from standing one juror at foot of panel was removed by her subsequent examination and excusal for cause. G.S. § 9-21.

8. Criminal Law ⇐517.2(2)

Oral waiver of counsel was effective where challenged confession was made subsequent to 30 October, 1971; written waiver of counsel was not a prerequisite to admissibility of uncounseled confession. G.S. § 7A-457.

9. Criminal Law ⇐671

When assistant district attorney asked sheriff to relate to jury a statement made to him by defendant, trial judge, on defendant's objection, properly excused the jury and conducted a voir dire hearing concerning admissibility of the statement.

10. Criminal Law ⇐1158(4)

Where competent evidence supports the findings of fact of a trial judge concerning voluntariness of a custodial statement, such findings are binding on an appellate court.

11. Criminal Law ⇐552

Where no conflicting testimony is offered on voir dire inquiry into admissibility of a confession it is not error for the judge to admit the confession without making specific findings of fact; however, it is better practice to find the facts on which the court concludes that the confession is admissible.

12. Criminal Law ⇐517.2(2)

Where it was uncontradicted that defendant was fully advised of his constitutional rights prior to each interrogation or encounter with law enforcement officers, that on each occasion he knowingly, intelligently, and voluntarily waived such rights and then proceeded to make inculpatory statements or otherwise aid the officers in the investigation, confession was properly received in evidence.

13. Criminal Law ⇐404(4)

General rule is that a weapon may be admitted into evidence on testimony of similarity between the proffered weapon and weapon used or possessed by defendant where there is evidence that a weapon was used in commission of the crime.

14. Criminal Law ⇐⇒401(4)

Although several witnesses were able to testify only that proffered pistol was similar to one owned by deceased, the pistol was properly admitted in view of subsequent testimony of another witness that proffered pistol was "the pistol" and that he bought such pistol from codefendant following offense, in toto, testimony was sufficient to establish relevancy and identity of the weapon.

15. Indictment and Information ⇐⇒72

Requirement that indictment in case involving several offenses growing out of the same incident be couched in the conjunctive rather than the disjunctive is a sound rule of criminal pleading designed to inform the defendant of the crime for which he stands charged.

16. Indictment and Information ⇐⇒188

Where the several felonies charged clearly constitute part and parcel of the same transaction, there is no useful purpose in requiring that the proof must indicate the commission of each of the several crimes.

17. Homicide ⇐⇒310(1)

Although indictment charged murder in the perpetration of the felonies of burglary and attempted robbery it was not prejudicial to instruct that jury could return a verdict of guilty of murder in the first degree if it found that the killing was committed in the perpetration of either burglary or attempted robbery since the finding that homicide was committed in the perpetration of either crime sufficed to support the conviction of murder in the first degree. G.S. §§ 14–17, 14–177.

18. Robbery ⇐⇒3

Essential element of attempted robbery is the felonious intent to deprive the owner of his property permanently and to convert it to the use of the criminal.

19. Burglary ⇐⇒3

Essential element of the crime of burglary is intent to commit a felony in the dwelling house broken into.

20. Homicide ⇐⇒28

If at time victim was killed defendant was so drunk that he could not have formed the felonious intent required in order to constitute crimes of burglary and attempted robbery, he could not be guilty of murder in the first degree under the felony-murder theory since an essential element of both crimes would be lacking and the murder could not have been committed in the perpetration of the specified felony. G.S. §§ 14–17, 14–177.

21. Criminal Law ⇐⇒55

To justify finding that defendant's intoxication affected his ability to formulate a specific intent the defendant must have been so drunk as to be utterly incapable of forming such intent.

22. Criminal Law ⇐⇒252

Burden is on a defendant to prove to the satisfaction of the jury his degree of intoxication.

23. Criminal Law ⇐⇒1177.7

Giving of instructions on intoxication as a defense was not prejudicial error, notwithstanding want of sufficient evidence to submit theory of intoxication or failure to instruct that defendant must have been so drunk as to be utterly incapable of forming a specific intent and that defendant has burden of proof on the plea of intoxication since error was in defendant's favor.

24. Homicide ⇐⇒354

Imposition of mandatory death sentence for murder in the first degree did not violate governing constitutional principles. G.S. §§ 14–17, 14–177.

Defendant was tried upon a bill of indictment, proper in form, which charged that Ernest Ray Simmons "unlawfully and wilfully, feloniously and of his malice afore-

thought did kill and murder Mary C. Powell which said murder was committed in the perpetration of the felony crime of burglary and the attempted perpetration of the felony crime of robbery. . . . ." Defendant, through his court appointed counsel, entered a plea of not guilty.

The State's evidence tended to show the following facts:

On Saturday morning, 15 December 1973, Cecelia Mills, a part-time domestic employee, went to the Powell home to work and there discovered Mrs. Powell's body on the floor near a fireplace in the front room. She immediately went to Ned Pittman's house for help. Pittman, who lived on Mrs. Powell's farm, went to Avent's Store and requested Mrs. Avent to notify the Nash County Sheriff's Department. Mrs. Powell lived alone, and Ned Pittman had cut wood and played cards at her porch on the preceding Friday but did not see Mrs. Powell at that time.

Annie Harris, apparently the last person to see Mrs. Powell alive, testified that he went to Mrs. Powell's house on Thursday, 13 December, between four o'clock and five o'clock p. m. and talked to with her at that time. Several witnesses testified that they observed an orange-colored automobile with a light top and fluorescent stripes parked across the road from Mrs. Powell's house between the hours of 5:00 and 9:30 p. m. on the night of 13 December.

Dr. D. E. Scarborough, a physician specializing in pathology, testified that the cause of Mrs. Powell's death was hemorrhage resulting from gunshot wounds.

Jimmie Smith testified that he purchased and gave to Mrs. Powell a .25 caliber automatic Galesi pistol and further stated that the pistol marked State's Exhibit 5 was similar to the pistol which he gave Mrs. Powell some five years prior to her death. Ernest Richardson identified State's Exhibit 5 as the pistol which he purchased from Frank Silver, the other person charged with this crime but tried separately. Richardson said that Silver first offered to sell him the pistol on 14 December 1973, but he and Silver could not agree on a price. Silver returned to the Richardson home on 15 December and completed the sale. Two or three days later Nash County Sheriff C. O. Womble, an S.B.I. agent, and Frank Silver went to the Richardson house, and Richardson at that time gave the pistol to the S.B.I. agent.

Martha Jones testified that defendant came to her house on the night of 13 December 1973. Later in the evening Frank Silver, his wife, his child, his brother, and his sister came to her house in a red automobile with a white top driven by Silver. Silver and defendant left in Silver's car, and when they returned about an hour later, defendant asked her for a shotgun. She observed that he had been drinking and would not let him have the gun. The two men left again but returned later in the night. They both then left her house, and she did not see either of them again that night.

William B. Driver testified that he sold Frank Silver four Victory .32 gauge shotgun shells on the night of 13 December 1973.

Sheriff Womble testified that on 15 December 1973, along with other law enforcement officers, he went to the home of Mrs. Mary Powell, where he found her body lying in the front room in front of the fireplace. He observed a hole in the right middle pane of the window located to the right of the front door, and glass was spread all over the room. A gun wadding was found near the body. One of the other officers discovered a spent .32 gauge gun shell in the driveway leading to the Powell house. Over objection of defense counsel and after conducting a *voir dire* examination, Judge Webb allowed Sheriff Womble to relate to the jury certain incalpatory statements made to him by defendant. Further facts concerning the content and admissibility of these statements appear in the opinion.

Defendant offered no evidence.

The jury returned a verdict of guilty of murder in the first degree, and Judge Webb imposed the mandatory death sentence.

Atty. Gen. James H. Carson, Jr., by Asst. Attys. Gen. William P. G'Connell and William Woodward Webb, Raleigh, for the State.

Thomas W. Henson, Rocky Mount, for defendant.

BRANCH, Justice.

Defendant contends that the trial judge committed prejudicial error by questioning prospective jurors concerning their views as to capital punishment and by excusing Juror Dozier from the jury panel because of her views concerning capital punishment.

[1] The Court considered and answered the first portion of defendant's contention in State v. Britt, 285 N.C. 256, 204 S.E.2d 811. There the Court stated: "It was error for the trial judge to refuse to allow counsel for defendant and the Solicitor for the State to inquire into the moral or religious scruples, beliefs and attitudes of the prospective jurors concerning capital punishment." Certainly the trial judge in the exercise of his duty to supervise and control the trial so as to insure a fair trial to all parties had the right and duty to interrogate prospective jurors in order to clarify their answers concerning their beliefs as to capital punishment. State v. Strickland, 284 N.C. 68, 199 S.E.2d 781.

By this assignment of error defendant also argues that Judge Webb offended the principles advanced in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776.

During the *voir dire* examination of Juror Dozier, the following exchange occurred:

"Q. Mrs. Dozier, do you have any moral or religious scruples or beliefs against capital punishment?

A. Yes, I don't believe in killing.

Q. On account of your beliefs about capital punishment, would it be impossible under any circumstances and in any event for you to return a verdict of guilty as charged, even though the State were to prove the defendant's guilt beyond a reasonable doubt? I am asking would you be able to return a verdict of guilty if we satisfied you that the defendant was guilty and satisfied you from the evidence and beyond a reasonable doubt, knowing that upon that verdict the defendant would be returned to die in the gas chamber would you be able to return a verdict of guilty under those circumstances?

JUROR DOZIER: I don't understand you.

Q. You told me you did not believe in the death penalty and in killing?

A. Yes.

Q. I ask you with that belief would it be impossible for you to find the defendant guilty, if the State satisfied you from the evidence and beyond a reasonable doubt that he is guilty—if the State proved his guilt beyond a reasonable doubt, would it be impossible for you to return a verdict of guilty, knowing he would be sentenced to die in the gas chamber?

A. I don't know what to say there, to tell the truth.

THE COURT: As I understand it, you say you do not believe in capital punishment?

A. Yes, sir.

THE COURT: Even though the State's evidence satisfied you or all the evidence satisfied you beyond a reasonable doubt that the defendant is guilty, would it be impossible for you to return a verdict of guilty knowing that if you did so the defendant would be sentenced to die in the gas chamber—do you understand my question?

A. (No answer).

THE COURT: Well, let me phrase it another way. If you should be satisfied from the evidence beyond a reasonable

doubt that the defendant was guilty, would you find him guilty in this case?

A. No.

THE COURT: You would not? And is the reason you would not be because you would know that would cause him to be sentenced to die in the gas chamber? Do you understand the question?

A. No, not definite I don't.

THE COURT: Well, as I understand it, you said that even though all the evidence convinced you beyond a reasonable doubt that the defendant was guilty, you would not find him guilty. Is that the way you answered the question?

A. That is the way I understood it.

THE COURT: Well, is that the way you meant to answer it—you would find the defendant not guilty even though all the evidence convinced you beyond a reasonable doubt that he was guilty? I am not trying to put words in your mouth, I just want to know if that is the way you answered that question? Do you understand my question to you? You understand that you are going to be called as a juror, once the evidence is in, to return to the jury room and then vote as to whether this defendant is guilty or not guilty. Do you understand that?

A. Yes, I understand that.

THE COURT: You understand that is what your function as a juror will be?

A. Yes.

THE COURT: That is what your duty as a juror will be. Do you understand that?

A. Yes, I understand that but I don't know.

THE COURT: If all the evidence convinced you beyond a reasonable doubt that the defendant was guilty of first degree murder, would you vote for a verdict of guilty of first degree murder—do you understand that question? If you were convinced after hearing all the evidence if you were convinced beyond a reasonable doubt that the defendant was guilty of first degree murder, what would you vote for? Would you vote for guilty or not guilty?

A. I would vote for not guilty.

THE COURT: And is the reason you would vote for not guilty is because you would know if you voted for a verdict of guilty, if the defendant were found guilty, what the sentence would be, that is that he would be sentenced to die in the gas chamber—is that the reason you would vote for not guilty, even though you were convinced beyond a reasonable doubt that he was guilty?

A. (No answer.)

THE COURT: All right. Well, the Court will excuse you from the trial of the case then. Thank you.

MR. BENSON: On what ground?

THE COURT: I am excusing her in the discretion of the Court. I am excusing her as a juror."

[2, 3] A defendant is not entitled to a jury of his choice but only to "a jury selected pursuant to law and without unconstitutional discrimination against a class or substantial group of the community from which the jury panel is drawn. He has no 'vested right to a particular juror.'" State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241, *reversed as to punishment*, 403 U.S. 948, 91 S.Ct. 2283, 29 L.Ed.2d 859, State v. Vann, 282 N.C. 621, 77 S.E. 2d 2d. In exercising his duty to see that a fair and impartial jury is impaneled, the trial judge, in his discretion, may in proper cases excuse a prospective juror without a challenge by either party. State v. Atkinson, *supra*; State v. Vann, *supra*; State v. Vick, 132 N.C. 989, 43 S.E. 626.

Although there was no formal challenge of Juror Dozier by the State and the trial judge stated that he excused the juror "in the discretion of the Court," it is obvious from the circumstances disclosed by the record that the juror was excused because of her expressed scruples against capital

punishment. Thus, our remaining question under the assignment of error focuses upon whether Juror Dozier's responses to questions on voir dire indicated that, knowing that the penalty would be death, she could not return a verdict of guilty, even though the State proved to her by the evidence and beyond a reasonable doubt that the defendant was guilty of the capital crime charged. Witherspoon v. Illinois, *supra*; State v. Washington, 283 N.C. 175, 195 S.E.2d 491, cert. denied, 410 U.S. 1052, 93 S.Ct. 1753, 36 L.Ed.2d 202; State v. Todd, 282 N.C. 643, 194 S.E.2d 10; State v. Fowler, 280 N.C. 91, 185 S.E.2d 677, *vacated as to punishment*, 408 U.S. 939, 92 S.Ct. 2868, 33 L.Ed.2d 765.

[4] It is now established in the jurisdiction that even though a prospective juror's voir dire answers to questions concerning his beliefs as to capital punishment may be equivocal and not models of clarity, it is proper for the trial judge to excuse the juror for cause when a conscientious consideration of the entire *voir dire* examination indicates that the juror could not vote for a verdict which would result in the imposition of the death penalty. State v. Avery, 286 N.C. 459, 212 S.E.2d 142; State v. Noell, 284 N.C. 670, 202 S.E.2d 769. *See* Annotation, 39 A.L.R.3d 550.

[5] We hold that, when considered contextually, the answers of the prospective Juror Dozier reveal that she could not vote for a verdict of guilty in this capital case even though the State might have proved to her by evidence beyond a reasonable doubt that defendant was guilty as charged. We note that the record fails to show that defendant exhausted his peremptory challenges.

The only argument brought forward in defendant's brief concerning removal of jurors from the panel relates to Juror Dozier. We have nevertheless carefully examined the exceptions as to the removal of other jurors and find no error prejudicial to defendant.

[6, 7] Defendant assigns as error the action of the trial court in standing the Juror Sharpe at the foot of the panel and in failing to have the names of the jurors read prior to impaneling the jury.

The purpose of requiring the Clerk to read the names of the jurors is to enable a defendant to exercise intelligently his right to challenge before the jury is impaneled. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674. Here counsel for defendant interposed no objection to the Clerk's failure to read over the names of the jurors until after the jury was impaneled. The record is silent as to whether counsel had a written list of the jurors. Furthermore, any possible prejudice resulting from standing Juror Sharpe at the foot of the panel was removed by her subsequent examination and excusal for cause. The State concedes that a technical violation of the provisions of G.S. § 9-21 occurred, but takes the position that such error was not prejudicial, particularly since defendant did not object prior to the impaneling of the jury. We agree. This assignment of error is overruled.

Defendant assigns as error the admission into evidence of his custodial confession.

[8] He first argues that the confession was inadmissible because there was no written waiver of counsel. He relies upon State v. Lynch, 279 N.C. 1, 181 S.E.2d 561, in which this Court interpreted G.S. § 7A-457 to hold that all waivers of counsel by indigent persons must be in writing. However, by Chapter 1253 of the Session Laws of 1971, the General Assembly amended G.S. § 7A-457, effective 30 October 1971, by adding Subsection (c), which provides:

> "An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, *either orally or in writing*, waive the right to out-of-court representation by counsel." (Emphasis supplied.)

The challenged statement was made subsequent to 30 October 1971, and the 1971 enactment by the Legislature supersedes

that portion of *Lynch* which interpreted G.S. § 7A-457 to require that all waivers of counsel by indigent persons be in writing. This portion of defendant's argument obviously lacks merit. We therefore turn to the question of whether defendant's custodial statements were voluntarily made.

[9] When the Assistant District Attorney asked Sheriff Womble to relate to the jury a statement made to him by defendant, counsel for defendant objected. The trial judge thereupon properly excused the jury and conducted a *voir dire* hearing concerning the admissibility of this statement. On *voir dire* Sheriff Womble testified that he talked to Ernest Ivey Simmons on 20 December 1973 about the death of Mrs. Mary C. Powell. The Sheriff testified that, before defendant made any inculpatory statements, the following exchange between the Sheriff and defendant occurred:

"I told him I wanted to talk to him about the death of Mrs. Powell; told him that the law required me to warn him of his rights; he did not have to make any statements, other than what he had given me, his name and his address. Told him that anything that he did make could and would be used against him in court; that he had a right to an attorney if he wanted one, of his own choosing, and if he wanted one and wasn't able to afford one that one would be appointed him before any questions was [sic] asked, or during questioning. I also told him that if he decided to make any statements or answer any questions that he had a right to quit talking at any time he wanted to; and I asked him if he understood his rights and he said he did. I asked if he understood what I had said to him. He said he did. I asked him if he wanted a lawyer now. He said he did not. I asked him if he wanted to make some statements. He said he did."

The Sheriff further testified that he promised defendant nothing, that he did not threaten defendant, and that defendant, who appeared "normal," talked freely and appeared to understand all questions asked him.

Simmons then, in substance, told the Sheriff that on the night of 13 December 1973 he and Frank Silver went to Mrs. Powell's home after parking Silver's automobile across the road. He went to the house and looked in while Silver waited for him near a fence. Mrs. Powell was looking at television, and he at that time saw what he described as a big dog in the house. He then told Silver that he was not going into the house without a gun. Thereupon they went to Martha Jones's house, where Simmons unsuccessfully attempted to get a gun. Silver told him that he knew where they could get a gun. They stopped at Driver's Store, where Silver purchased four shotgun shells, and then proceeded to the home of Silver's father, where they obtained a shotgun. Upon returning to the vicinity of the Powell home, Silver parked his car in a path across the road from the Powell home. Silver was loading the gun as they walked along the driveway to the Powell house, and it accidentally went off. Silver breached the gun, and the shell flew out. When Mrs. Powell looked out the window, they left and approached the home from a different direction. With Simmons leading the way, they finally came to the front of the house. He again looked in, saw Mrs. Powell, and told Silver that she was "poking in the fire." Silver stepped up and shot her through the window. The Sheriff stated on cross-examination that Silver had said "that Ernest was the one doing the shooting." The Sheriff also stated that he talked with Simmons on Friday, 21 December 1973, and Saturday, 22 December 1973, and on these occasions Simmons made statements which further implicated him in the killing. Before talking to Simmons on 21 December and 22 December, he again warned Simmons of his rights in language substantially the same as that employed prior to his interrogation on 20 December. The only other State's witness on *voir dire* was S.B.I. Agent E. B. Cross, who testified that at the request of Sheriff Womble he

went to the farm where defendant worked and requested him to come in to talk to the Sheriff. Defendant agreed to accompany him to Nashville. He did not interrogate defendant, but he did "warn him of his rights" after they reached the courthouse.

Defendant offered no evidence on *voir dire*. At the conclusion of the *voir dire* hearing, Judge Webb found and ruled as follows:

". . . Let the record show then at the end of the voir dire hearing, the Court finds as a fact that on the dates of December 20, 21, 22, 1975, at the time of questioning the defendant that Glenn O. Womble, Sheriff of Nash County, before receiving any statement from the defendant, fully advised him of his right to remain silent [sic], his right to have counsel represent him; his right to have the State pay for counsel if he could not afford counsel and warned him of his possible self incrimination. That the defendant fully understood these rights that he freely, voluntarily and understandingly waived his right to remain silent and to have counsel present at any questionings. Any statements the defendant made to the sheriff, Glenn O. Womble, on December 20, 21 and 22, 1975 are admissible in evidence. The defendant's objections to these questions are overruled."

[10-12] It is familiar law that, where competent evidence supports the findings of fact of a trial judge concerning the voluntariness of a custodial statement, such findings are binding upon an appellate court. State v. Heptney, 280 N.C. 305, 185 S.E.2d 844; State v. Smith, 278 N.C. 36, 178 S.E.2d 53, cert. denied, 403 U.S. 911, 91 S.Ct. 2206, 29 L.Ed.2d 715; State v. Wright, 274 N.C. 305, 163 S.E.2d 387. Further, where, as here, no conflicting testimony is offered on *voir dire*, it is not error for the judge to admit the confession without making specific findings of fact. State v. Lynch, *supra*; State v. Bishop, 272 N.C. 283, 158 S.E.2d 511; State v. Leith, 266 N.C. 263, 145 S.E.2d 841. As we noted in *Lynch*, however, it is "always a better practice for the court to find the facts upon which it concludes any confession is admissible." In instant case the facts are uncontradicted that defendant was fully advised of his constitutional rights prior to each interrogation or encounter with law enforcement officers; that on each occasion he knowingly, intelligently, and voluntarily waived those rights; and that he then proceeded to make inculpatory statements or otherwise to aid law enforcement officers in the investigation of this crime.

We hold that the evidence fully supports the trial judge's findings, conclusions, and ruling admitting into evidence defendant's inculpatory statements. This assignment of error is overruled.

Defendant next contends that the Court committed prejudicial error by admitting into evidence State's Exhibit 5, the pistol allegedly belonging to deceased. Defendant seems to take the position that since witnesses were able to testify only that the pistol was similar to the one owned by deceased without positively identifying the weapon as being the property of the deceased, the pistol should not have been admitted into evidence.

[13, 14] The general rule in this jurisdiction is that weapons may be admitted into evidence upon such testimony "where there is evidence tending to show that they were used in the commission of a crime." State v. Wilson, 280 N.C. 674, 187 S.E.2d 22. In State v. Crowder, 265 N.C. 42, 293 S.E.2d 38, this Court stated:

". . . Any article shown by the evidence to have been used in connection with the commission of the crime charged is competent and properly admitted into evidence. State v. Snowden, 274 N.C. 498, 164 S.E.2d 193 (1968). 'So far as the North Carolina decisions go, any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials. Thus, weapons may be admitted where there is evidence tending to show that they were used in

the commission of a crime or in defense against an assault." 1 Stansbury's North Carolina Evidence § 115 (Brandis rev. 1973)."

In State v. Mullin, 210 N.C. 295, 186 S.E. 325, it was proved that the deceased was killed with a shotgun. A single-barrel shotgun was found in the defendant's room, and a witness testified that the gun "was like the one" carried by the defendant on the night deceased was shot. The Court held that the shotgun was properly admitted into evidence. *Accord*: State v. Crowder, *supra*; State v. Patterson, 264 N.C. 130, 200 S.E.2d 16; State v. Isaac, 260 N.C. 425, 132 S.E.2d 861; State v. Muse, 256 N.C. 31, 123 S.E.2d 224, cert. denied, 386 U.S. 974, 87 S.Ct. 1168, 18 L.Ed.2d 134, rehearing denied, 389 U.S. 896, 88 S.Ct. 59, 19 L.Ed.2d 189; State v. Fox, 277 N.C. 1, 175 S.E.2d 561; State v. Jarrett, 271 N.C. 676, 157 S.E.2d 4; State v. Vines, 259 N.C. 780, 131 S.E.2d 374; State v. Keith, *supra*.

Finally, any doubt as to the admissibility of State's Exhibit 5 was dispelled by the testimony of the witness Ernest Richardson, who testified without objection or motion to strike that "[t]he Exhibit you are showing me marked State's Exhibit 5 for identification is the pistol." He further testified that he bought this pistol from Frank Silver on 18 December after negotiations which began on 14 December 1973. The testimony of the witness Richardson, when coupled with the testimony of several other witnesses that State's Exhibit 5 was similar or looked like the pistol formerly belonging to deceased, was sufficient to establish relevancy and identity of the weapon and thereby make it properly admissible into evidence. There is no merit in this assignment of error.

[15-17] Defendant next contends that the trial judge erroneously charged the jury with respect to the definition of the crime charged. More particularly, he argues that, since the indictment charged murder in the perpetration of the felonies of burglary *and* attempted robbery, it was prejudicial error for the trial judge to instruct the jury that it could return a verdict of guilty of murder in the first degree if it found that the killing was committed in the perpetration *of either* burglary *or* attempted robbery.

G.S. § 14-17, in pertinent part, provides:

"A murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, *robbery*, *kidnapping*, *burglary* or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . ." (Emphasis supplied.)

In interpreting this statute, we have stated:

"It is evident that under this statute [G.S. 14-17] a homicide is murder in the *first degree* if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not."

State v. Stanton, 281 N.C. 261, 56 S.E.2d 649.

We are unable to find any case precisely governing the point here raised. However, we think that some light is shed upon the question by State v. O'Keefe, 253 N.C. 53, 128 S.E.2d 767, cert. denied, 380 U.S. 965, 85 S.Ct. 1355, 14 L.Ed.2d 277. There defendant was charged with crime against nature in violation of G.S. § 14-177. The indictment did not specify whether the unnatural sexual act was *per os* or *per anum*, but the evidence for the State tended to show the commission of both types of crime as a part of the same incident. In rejecting a challenge to the sufficiency of the indictment, this Court made the following statement:

"'Acts entering into a single and continuous transaction may be charged together as a single offense.' 42 C.J.S. Indictments and Informations § 161, p. 1117; State v. Sherman, 81 Kan. 874, 107 P. 33 (Kan.). Where a single offence may be committed by several means, it may be charged in a single count if the ways and means are not repugnant and are compa-

rent parts of one transaction. State v. Laundy, 103 Or. 443, 201 P. 758, 205 P. 230. Proof of any one means will support conviction. United States v. Otto, 54 F.2d 277 (C.C.A.9th). And an instruction to this effect is not error. State v. Davis, 282 N.C. 47, 58, 191 S.E. 737."

The requirement that the indictment in such a case as this one be couched in the conjunctive rather than the disjunctive is a sound rule of criminal pleading designed to inform the defendant of the crime for which he stands charged. State v. Sellers, 273 N.C. 641, 161 S.E.2d 15, 42 C.J.S. Indictments and Informations § 166, 41 Am.Jur.2d Indictments and Informations § 95. However, where, as here, the felonies charged clearly constitute part and parcel of the same transaction, we perceive no useful purpose in requiring that the *proof* must include the conviction of *both* crimes. A finding that the homicide was committed in the perpetration of *either* crime suffices to support the conviction of murder in the first degree. We hold that it was not prejudicially erroneous for the trial judge to instruct that sufficient evidence of the perpetration of either felony would suffice to bring defendant within the felony-murder provision of G.S. § 14-17.

[18-23] Defendant contends that the trial judge erred in his instructions to the jury on intoxication as a defense. The trial judge, in part, charged:

"Generally, voluntary intoxication is not an excuse for a crime. However, if you should find the defendant was intoxicated you should consider whether this condition affected his ability to formulate [sic] the specific intent which is required in this case. First of all as I charged you on attempted armed robbery, you would have to be satisfied beyond a reasonable doubt that the defendant intended to rob Mary C. Powell, or you would also have to be satisfied if it is an attempted armed robbery that the defendant intended to deprive Mary C. Powell of the use of her property permanently. You would also have to be satisfied beyond a reasonable doubt that the defendant knew he was not entitled to take the property.

"As for a burglary, you would have to be satisfied beyond a reasonable doubt, in order for you to find that there was a burglary in progress, you would have to be satisfied beyond a reasonable doubt that at the time of the breaking and entering the defendant intended to commit some felony, in this case, robbery.

. . . . . .

"Ladies and gentlemen of the jury, I have been asked to charge you, which I will do, if considering the evidence with respect to the defendant's intoxication you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of murder in this case, you will return a verdict of not guilty."

One of the essential elements of attempted robbery is the felonious intent to deprive the owner of his property permanently and to convert it to the use of the criminal. State v. Norris, 264 N.C. 470, 141 S.E.2d 809. Likewise, one of the essential elements of the crime of burglary is the intent to commit a felony in the dwelling house broken into. State v. Henderson, 275 N.C. 1, 203 S.E.2d 10. If, at the time Mrs. Powell was killed, defendant was so drunk that he could not have formed the felonious intent required in order to constitute the crimes of burglary and attempted robbery, he could not be guilty of murder in the first degree since the State proceeded on the felony-murder theory, *i. e.*, the theory that the murder was committed in the perpetration of a felony. An essential element of both crimes would be lacking, and the murder could not have been committed in the perpetration of the specified felony. State v. Hamby, 276 N.C. 674, 174 S.E.2d 486; State v. Project, 274 N.C. 62, 161 S.E.2d 560; State v. Bigger, 225 N.C. 722, 32 S.E.2d 352; State v. Kelly, 219 N.C. 627, 6 S.E.2d 833; State v. Sterling, 200 N.C. 18, 156 S.E. 96.

We do not think that there was sufficient evidence in instant case to require the trial

judge to submit the plea of intoxication. Further, one of the principal exceptions to the charge on intoxication was the stringent language adopted by the Court to the effect that a defendant must be drunk as to be utterly incapable of forming a specific intent. Neither did the trial judge instruct the jury that the burden was upon defendant to prove to the satisfaction of the jury his plea of intoxication. State v. Creech, 275 N.C. 605, 51 S.E.2d 308; State v. Abler, 276 N.C. 697, 696, 10 S.E.2d 70. Thus, the instruction complained of, if erroneous, confined error to defendant Lane, and he cannot be heard to complain of said error. State v. Cook, 263 N.C. 780, 140 S.E.2d 311; State v. Hallcock, 262 N.C. 365, 61 S.E.2d 291; State v. Johnson, 226 N.C. 401, 51 S.E.2d 106; State v. King, 222 N.C. 238, 22 S.E.2d 615; State v. Levy, 224 N.C. 812, 19 S.E.2d 255; State v. Carpenter, 224 N.C. 615, 3 S.E.2d 21; State v. Whitehurst, 222 N.C. 67, 10 S.E.2d 625. We find no prejudicial error in the assignment.

[23] Defendant assigns as error the entry of the judgment of death and presents the contention that the death penalty as imposed in North Carolina violates the principles of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. All of the contentions which defendant presents under this assignment of error have been considered and rejected by this Court in numerous recent cases. *See, e. g.*, State v. Lumpkin, 286 N.C. 697, 212 S.E.2d 106; State v. Avery, *supra*; State v. Williams, 286 N.C. 422, 212 S.E.2d 113; State v. Sparks, 285 N.C. 631, 207 S.E.2d 732; State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844; State v. Fowler, 285 N.C. 90, 203 S.E.2d 803; State v. Pollard, 285 N.C. 72, 203 S.E.2d 6; State v. Noell, *supra*; State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721; State v. Waddell, 282 N.C. 431, 194 S.E.2d 19. On the authority of these cases, this assignment of error is overruled.

We have carefully examined each assignment of error as well as the entire record of this case and perceive no reversible error.

No error.

SHARP, Chief Justice dissents as to the death sentence and votes to remand for the imposition of life imprisonment for the reasons stated in her dissenting opinion in State v. McLaughlin, 286 N.C. ___, 210 S.E.2d 248 (1975).

COPELAND, Justice dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 427 at 437, 212 S.E.2d 113 (1975).

• EXUM, Justice dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 427, 212 S.E.2d 113 (1975), other than those relating to the effect of Section 8 of Chapter 1261 of the 1973 Session Laws.

STATE of North Carolina

v.

Dillard P. LAIRD and Breary Hall

No. 40.

Supreme Court of North Carolina.

April 14, 1975.

By separate judgments in the District Court the defendants were convicted of unlawful and willful dissemination of obscene material and they appealed for a trial de novo. The Superior Court of Alamance

Appendix B

Pp. 11-51, Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This case and four contemporary cases[6/] present the question of the constitutionality of the death penalty as that penalty was resurrected in the State of North Carolina by a four-to-three vote of the North Carolina Supreme Court following Furman v. Georgia, 408 U.S. 238 (1972). A brief review of post-Furman developments relating to the death penalty in the United States generally and in North Carolina particularly sets the question in perspective.

The nearly universal response of state courts in obedience to Furman was to hold that death sentences could no longer be meted out under the capital punishment laws which had been in effect prior to June 29, 1972, and which the Furman decision

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6 / Crowder v. North Carolina, O.T. 1973, No. 73-
Henderson v. North Carolina, O.T. 1973, No. 73-
Jarrette v. North Carolina, O.T. 1973, No. 73-
Noell v. North Carolina, O. T. 1973, No. 73-

of that date declared unconstitutional.[7] Subsequently, statutes

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7/ See, e.g., United States v. Lee, 489 F.2d 1242 (CA DC 1972); United States v. Woods, 484 F.2d 127, 138 (CA4 1973) ("Since the decision in Furman v. Georgia, ... the statute under which defendant was convicted of first degree murder, 18 U.S.C. §111, provides as the only possible sentence imprisonment for life" at 138); United States v. McNally, 485 F.2d 398 (CA8 1973); Hubbard v. State, 290 Ala. 118, 274 So.2d 298 (1973) ("There is no question that Furman has, as of now, eliminated the death penalty from our statute. The elimination of the death penalty does not destroy the entire statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment." 274 So.2d at 300); State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973) ("In view of [the Furman ruling] we hold that the death penalty provisions of [the Arizona murder statute] are unconstitutional." 506 P.2d at 254); O'Neal v. State, 253 Ark. 574, 487 S.W. 2d 618 (1972); People v. Murphy, 8 Cal. 3d 349, 105 Cal. Rptr. 139, 503 P.2d 594 (1972); State v. Dillon, ___ Conn. ___, 295 A.2d 666 (1972); Anderson, et al., v. State, 267 So. 2d 8 (Fla. 1972); Sullivan et al. v. State, 229 Ga. 731, 194 S.E. 2d 411 (1972); People v. Speck, 52 Ill. 2d 284, 287 N.E. 2d 689 (1972) ("The Supreme Court of the United States has now held that a defendant could not be validly sentenced to death under [pre-Furman Illinois capital statutes]." 287 N.E.2d at 700; Adams v. State, ___ Ind. ___, 284 N.E.2d 757 (1972); State v. Kendel, 212 Kan. 461, 513 P.2d 248 (1973) (". . .court is of the opinion that the death penalty provision of our present statute is constitutionally impermissible. The 1972 Legislature of Kansas considered but failed to enact amendatory legislation." 513 P.2d at 250); Caine and McIntosh v. Commonwealth, 491 S.W.2d 824 (Ky. 1973), cert. den. 414 U.S. 876; State v. Flood, 263 La. 700, 269 So.2d 212 (1972) ("the Furman case has eliminated 'capital offenses' in Louisiana." 269 So.2d at 214); Bartholmey v. State, 267 Md. 175, 297 A.2d 696 (1972); Commonwealth v. LeBlanc, ___ Mass. ___, 299 N.E.2d 719 (1973); Cupler v. State, ___ Miss. ___, 268 So. 2d 338 (1972) (". . . the harsher penalty of death may not be lawfully imposed. The remaining part of the statute is complete. . . .We hold that because of Furman v. Georgia, the death penalty cannot be inflicted, that the remainder of the statute is valid and the only other punishment for murder is life imprisonment." 268 So.2d at 339-40); State v. Scott, 491 S.W.2d 514 (Mo. 1973) ("The sole and only punishment for first degree murder in this state is now life imprisonment." at 521); State v. Alvarez, No. 27435, Dist. Ct. Lancaster Cty., Neb. Oct. 4, 1972; Walker v. State, 88 Nev. 539, 501 P.2d 651 (1972); State v. Martinegu and Nelson, 112 N.H. 278, 293 A.2d 766 (1972); People v. Fitzpatrick, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973), cert. den. 38 L.Ed. 2d 338, 94 S.C. 554 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972) ("Under [the Furman] holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional [with possible exceptions not relevant here]." 285 N.E. 2d at 755); Pate v. State, 507 P.2d 915 (Okla. 1973) ("After an exhaustive study of the [Furman] opinions . . . this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as

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were enacted in slightly more than half the States (and by the federal government), authorizing the use of the punishment of death in differingly defined categories of cases.[8] The statutes vary widely in their terms and forms, and consequently vary

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7/ cont'd

the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia," at 916); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); Hunter, et al. v. State, ___ Tenn. ___, 496 S.W.2d 900 (1972) ("The effect of [Furman] . . . is to render void the penalty of death as it exists under the statutes of Tennessee." 496 S.W.2d at 902); Lopez v. State, 500 S.W.2d 844 (Tex. Crim. 1973) (". . . we find the inescapable conclusion to be that the holding in Furman and Branch rendered it impermissible under the Constitution of the United States to impose the death penalty under our ten existing statutes." At 846); Wood v. Commonwealth, 213 Va. 346, 192 S.E.2d 808 (1972); State v. Vidal, 82 Wash.2d 94, 508 P.2d 158 (1973) ("The recent case of Furman v. Georgia . . . has the effect of preventing the imposition of the death penalty under the existing statutes of the State of Washington." 508 P.2d at 162).

8/ Some of these new statutes provide that a court or jury must make a separate determination as to whether a defendant should be sentenced to life or death independently of its finding the defendant guilty of a capital crime; conviction of a particular offense does not, therefore, necessarily result in a death sentence. Some of these laws provide a single verdict proceeding, in which the trial judge or jury must return a general verdict finding a defendant guilty of a capital degree of the offense. Del. Code, tit. 11, § 636 (1974), as amended by Del. H.B. No. 429, 127th Gen. Ass. (1974); N.H. Rev. Stat. Ann. § 630:1(1) (1973), as amended by N.H. S.B. 27, Chap. 34, Acts of 1974, N.H. Gen. Ct.; N.Mex. Stat. §§ 40A-2-1, 40A-2-1(A), 40A-29-2 (1974); N.C. Gen. Stat. §§ 14-17, 14-21, as amended by S.B. 157, Chap. 1201, 1973 Sess. Laws (2nd Sess. 1974); Tenn. Code Ann. §§ 39-2402 (as amended by Pub. Chap. 462, Tenn. Laws 1974), 39-3702 (as amended by Pub. Chap. 461, Tenn. Laws 1974) (1974). Others of these statutes provide a unitary proceeding where a jury must return a verdict finding special facts to justify the death sentence. Ind. Code § 10-3401 (1974); Ky. Rev. Stat. Chap. 507, as amended by Ky. H.B. No. 232, Reg. Sess. 1974; La. Rev. Stat. §§ 14:30, 14:42, 14:44, 14:113 (1974); La. Code

somewhat in the questions they present regarding their compliance with Furman and with the Eighth and Fourteenth Amendments to

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8/ cont'd

Crim. Proc., Art. 557, 598, 817 (1974); Miss. Code §§ 97-3-19, 97-3-65 (1974), as amended by Miss. S.B. No. 2341, Reg. Sess. 1974; Mont. Code §§ 94-5-102, 94-5-103, 94-5-105, 94-5-304 (as amended by Mont. H.B. No. 643, Mont. Gen. Laws 1974) (1974); Nev. Code § 200.030 (1974); Okla. Stat., tit. 21, §§ 701.1, 701.3, 701.6 (1974); Wyo. Stat. § 6-54 (1974). Among the new laws which provide a bifurcated proceeding to make this separate determination as to sentence, some allow imposition of sentence without any particular finding identified by the legislature as a prerequisite for imposing either a sentence of death or life imprisonment. Ga. Code § 27-2534.1 (1973), as amended by No. 74, Ga. 1973 Sess. Laws at 162-172; Utah Crim. Code §§ 76-3-206, 76-5-202, 76-5-302, 76-3-207 (1974). Others of these bifurcated trial statutes require the imposition of a death sentence when a certain finding is made at the sentencing proceeding; some identify a particular circumstance which justifies imposition of a death sentence. Cal. Penal Code §§ 190, 190.1, 190.2, 209, 219, 4500 (1974); Ill. Code §§ 9-1a, 9-1 (1974); Tex. Pen. Code § 19.02 (1974); Tex. Code Crim. Proc., Art. 37.071 (1974); others identify such circumstances but provide that such "aggravating" circumstances may be counterbalanced by the finding of "mitigating" circumstances in some unspecified fashion, Ariz. Rev. Stat. §§ 13-452 - 13-454 (1974; Ark. Code §§ 41-4702 - 41-4713 Fla. Stat. §§ 782.01, 794.01, 782.141 (1974); Neb. Code §§ 28-401, 29-2522, 29-2523, 29-2524 (1974); still others provide formulae for the weighting of "aggravating" against "mitigating" circumstances to determine which defendants shall be sentenced to death. Conn. Gen. Stat. § 53a-45 (1974); Ohio Rev. Code §§ 2929.03, 2929.04 (1974); Pa. Stat., tit. 18, § 4701 (1974), as amended by Pa. H.B. 1060, Act. 46, 1974 Sess.

Another group of statutes provides for the imposition of a death sentence by operation of law pursuant to a jury's or trial judge's conviction of a certain crime. Idaho Code §§ 18-4003, 18-4004 (1974); R.I. Code § 11-23-2 (1974); New York: Ass. Bill 11474, 1974 Sess. Laws.

The following States have not enacted legislation authorizing the death penalty since Furman: Alaska, Alabama, Colorado, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Dakota, Oregon, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Vermont.

the Constitution. [9] It is a fair although gross generalization that, in most States, the new statutes authorize capital punishment for a narrower category of offenses than those that were punishable by death in the same States before Furman. Of the 103 men and women who have been sentenced to die in the United States since June 29, 1972, and who are presently on death row, [10] roughly two-thirds were condemned under the new post-Furman statutes.

Virtually all of the remainder [11] -- 31 men and women, to be

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9/ The first decisions by the highest court of any State affirming death sentences imposed under one of the new post-Furman statutes were handed down in a Georgia murder case, State v. House, Ga. Sup. Ct. No. 28678 (April 4, 1974) (rehearing denied, April 25, 1974); and in a Georgia rape case, State v. Eberheart, Ga. Sup. Ct. No. 28776 (April 30, 1974) (rehearing denied, May 21, 1974). Counsel for Mr. House and Mr. Eberheart (who include some of the counsel for petitioner Dillard) are presently preparing to seek review by this Court of the Georgia Supreme Court's decisions.

10/ We exclude from this computation a number of persons sentenced to death since Furman whose convictions or death sentences have been reversed or vacated on appeal. The 99 figure represents persons presently committed under unreversed and unvacated sentences of death.

11/ Seven persons have been sentenced to die since Furman under the provisions of pre-Furman statutes. The cases of six of these persons (in Massachusetts, Montana, Pennsylvania, and South Carolina) are described in note 14, infra. The remaining case arises under a Virginia statute which the Virginia Supreme Court held distinguishable from the statutes invalidated in Furman. State v. Jefferson, Va. S.C., No. 730370, decided April 22, 1974. A petition for rehearing is presently pending in Jefferson. Should it be denied, counsel for Mr. Jefferson (who are associated with some of the counsel for petitioner Dillard) anticipate that review will be sought in this Court.

exact -- are on death row in North Carolina, where post-Furman developments took a markedly different turn by the margin of a single vote on the North Carolina Supreme Court in the case of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Prior to 1947, North Carolina law had required the imposition of the death penalty upon all convictions for the crimes of first-degree murder, rape, first degree burglary, and arson. By enactments of 1947 and 1949, the North Carolina General Assembly provided that, in the case of convictions for any of these four offenses, the jury might spare the defendant's life by a recommendation of life imprisonment. 12/ An unanimous Supreme Court of North Carolina

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12/ The jury was given the power to recommend life imprisonment in arson and burglary cases in 1947, and in murder and rape cases in 1949. We have found no legislative history dealing directly with the 1947 enactment.

The limited legislative history available for the 1949 North Carolina legislative action reflects a clear and considered abandonment of a general mandatory death penalty. As noted in State v. Pugh, 250 N.C. 278, 108 S.E.2d 649, 642 (concurring opinion of Denny, J.), the 1947 General Assembly created a Special Commission for the Improvement of the Administration of Justice. That Commission recommended, inter alia:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder, because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

[footnote continued]

concluded in Waddell that, as amended in 1947 and 1949 and operative for nearly a quarter-century between 1949 and 1972, the North Carolina statutes inflicting capital punishment for first degree murder, rape, first degree burglary and arson were unconstitutional under Furman. Three Justices of the court therefore would have held that the death penalties provided by North Carolina law on the dates of the Furman and Waddell decisions were constitutionally unenforceable then and thenceforth until (at the least) the enactment of new capital punishment legislation by the General Assembly. But a majority of four Justices

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12/ cont'd.

POPULAR GOVERNMENT (January 1949) (published by the Institute of Government, University of North Carolina, Chapel Hill, North Carolina), p. 13. The North Carolina Supreme Court commented on the legislative intent indicated by the 1949 measures in State v. McMillan, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning, - a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.
>
> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison . . . . No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right."

held that the only portion of North Carolina law invalidated by Furman was the 1949 "recommendation" provision, with the result that (prospectively from the January 18, 1973, date of the Waddell decision) North Carolina law reverted to its pre-1949 state:

> "[T]he effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death." (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, 20-29(1973).)

Under these procedures, petitioner and the other 30 persons now inhabiting North Carolina's death row were sentenced to die between the date of Waddell and the date of the enactment of a new North Carolina death penalty statute on April 8, 1974. 13/

The question presented here is the federal constitutionality of death sentences imposed in North Carolina pursuant to the Waddell procedures and without new legislative authorization after Furman. Most immediately, that question is potentially decisive of the lives of the 31 condemned inmates in the State

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13/ See note 2, supra.

which now has the largest death row population in the Nation. It may also have direct implications for death sentencing in four other States.[14/] Depending, of course, upon the grounds on which this Court elects to consider the question, it may or it may not have implications -- of narrower or broader scope -- for the death penalties enacted by post-Furman legislation.

14/ The only other state appellate court that has dealt with Furman in the fashion of Waddell is the Supreme Court of Delaware, in State v. Dickerson, Del. , 298 A.2d 761 (1972). The Dickerson opinion was announced prospectively on November 1, 1972. No capital convictions were returned in the State of Delaware between that date and the dates upon which, successively, (1) a new criminal code enacted before Furman but effective July 1, 1973, came into effect, repealing the statutory provisions upon which Dickerson rested, and (2) the Delaware legislature enacted a post-Furman statute effective March 29, 1974. There is presently pending litigation in the Delaware Supreme Court raising the issues of the effects upon Dickerson of the supervening code and post-Furman enactment. State v. Smith, Del. S.C. No. 52,1974.

Trial courts in Massachusetts and South Carolina have imposed death penalties after Furman under the purported authorization of pre-Furman statutes and in apparent reliance upon the rationale of Waddell and Dickerson. Commonwealth v. Brown, Clinkscales, and Johnson, Superior Ct., Suffolk Co. (Mass.), Nos. 74502-3-4 and 74516-17-18; State v. Speights, Ct. of Gen. Sess., Florence Co. (S.C.), No. 5053. It is also possible that three post-Furman death sentences imposed in Montana and Pennsylvania under pre-Furman legislation rest upon the same rationale, although the trial judges' reasoning in these cases more likely stands upon other grounds. State v. Rhodes & Shields, Mont. S. Ct. Nos. 12596 and 12597; Commonwealth v. Martin, Pa. Sup. Ct., No. 44 (March Term, 1974). All of the cases just mentioned are presently pending in the respective Supreme Courts of the States in which they arise.

A. Evasion of the Furman Decision

The narrowest issue raised is simply whether the majority of the North Carolina Supreme Court in Waddell read Furman correctly and applied Furman permissibly in holding that Furman invalidated only the 1949 "recommendation" provision of North Carolina law, rather than the underlying death penalty. As tortured as that holding may seem -- being the lethal equivalent of a state-court holding that Brown v. Board of Education required the closing of the public schools instead of their desegregation -- it is not entirely unprecedented. Twice in recent years this Court has corrected similar manipulations of state-law severability doctrines designed to emasculate a constitutional decision of the Court forbidding the imposition and carrying out of impermissible death sentences. Funicello v. New Jersey, 403 U.S. 948 (1971)(alternative ground); Thomas v. Leeke, 403 U.S. 948 (1971).

These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading non volt (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in United States v. Jackson, 390 U.S. 570 (1968), and Pope v. United States, 392 U.S. 651 (1968). The South Carolina Supreme Court in Thomas recognized the incompatibility of its statutory guilty-plea scheme with the constitutional principle of Jackson, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme

Court attempted to distinguish Jackson but held alternatively that, if Jackson did invalidate New Jersey's non vult provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court declined the gambit.

What a majority of the North Carolina Supreme Court has done here, albeit by a somewhat different mechanism, is much the same thing. During a quarter of a century between enactment of the legislative "recommendation" procedure in 1949 and enactment of a new post-Furman death-sentencing procedure by the North Carolina legislature in 1974, countless men died and others guilty of identical crimes were spared death pursuant to an arbitrary selective procedure which -- as the North Carolina Supreme Court itself has concluded -- falls unmistakably within the ban of Furman. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate manipulation of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-Furman North Carolina statutes authorizing capital

punishment would be arbitrary and selective, and hence a constitutionally cruel and unusual punishment, in the wake of Furman. Thirty-one more persons are thus tossed into the death column as opposed to the now closed and hence forgotten column of the spared, upon the capital punishment ledgers of North Carolina since 1949. Whether the particular state-law contrivance by which that calculation is accomplished makes the deaths of these 31 persons any less selective, arbitrary, cruel and unusual in federal constitutional contemplation is, we suggest, an issue that this Court should address, if its Furman decision is to have the vitality and respect that the Supremacy Clause rightly commands.

B. The Lawless Imposition Of Death Penalties

The second issue presented is whether the re-institution of the death penalty which the North Carolina Supreme Court achieved by amputating life from that State's life-or-death sentencing statutes is a result that can constitutionally be effected by any device of judicial decision wholly ungoverned and undirected by legislative action. It is, of course, generally true that the federal Constitution is not concerned with how a State divides it law-making functions between its judicial and legislative organs. But that generalization cannot be permitted to sweep away the fundamental concerns of the Eighth and Fourteenth Amendments against judicial imposition of harsh criminal punishments unauthorized by law and in excess of the penalties provided by "the valid laws of the land." Giaccio v. Pennsylvania, 382 U. S. 399, 403 (1966).

Recent scholarship has underscored that the English Bill of Rights, from which the Eighth Amendment's prohibition of "cruel and unusual punishments" was derived, was in large measure directed toward preventing the exaction of unauthorized penalties.[15/] That

15/ Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). It is true that Granucci also find that the American Framers imperfectly understood the English background of the cruel-and-unusual-punishment clause, and that they themselves were principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to diminish the scope of a guarantee that they believed basic to their traditions (see 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (1863)), or to reject protections of the citizen long preserved by their English heritage. Indeed, as early as 1635, American settlers had "conceived great danger . . . in regard that . . . magistrates, for want of positive laws, in many cases, might proceed according to their discretions," and had therefore agreed "that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws." WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686, at 5 (1889). It should hardly be surprising that the cruel-and-unusual-punishment clause, like many of the other basic guarantees of the Bill of Rights, is woven of several strands and protects against more than a single evil.

function remains a vital office of the cruel-and-unusual punishment clause today,[16] although it certainly is not the exclusive focus of the clause.[17] As this Court pointed out in Weems v. United States, 217 U. S. 349, 376 (1909), the Framers were eager to assure "that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs." The conjunction of the words "cruel" and "unusual" in the Eighth Amendment can hardly be regarded as accidental if one appreciates the relationship, within a basically popular and democratic governmental structure, of the dangers of lawlessness, irregularity, arbitrary selectivity,[18] and cruelty.[19] For, in such a structure, harsh and unsufferable criminal penalties are most likely to spring from devices that evade the rule of law or subvert the ordinary protection afforded by its regularity and generality.

Due process of law, too, insures against the imposition of criminal sanctions that are not decreed in strict accordance with the regular course of law.

> "[T]he terms 'due process of law' . . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.'" Dent v. West Virginia, 129 U. S. 114, 123 (1889).

16/ See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 STAN L. REV. 838, 855-856 (1972).

17/ See Weems v. United States, 217 U. S. 359 (1909); Robinson v. California, 370 U. S. 660 (1962); Furman v. Georgia, 408 U. S. 238 (1972). And see note 15, supra.

18/ See section I(C), pp. 28-44, infra.

19/ This relationship is developed in Brief for Petitioner, Aikens v. California, 406 U. S. 813 (1972) [No. 68-5027], pp. 13-27, 39-56.

"The essence of [the] . . . principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules. 20/ So rudimentary has this principle been to American notions of Due Process, that unauthorized criminal penalties have rarely been imposed in this country; 21/ but, on the rare occasions when they have been examined by this Court, the Court has treated them as self-evidently void to the extent that they exceeded what was authorized by valid legislation. Ex parte Lange, 83 U. S. 163 (1874); Ex parte Mills, 135 U. S. 263 (1890); In re Bonner, 151 U. S. 243 (1894). In this century, the root principle has been most commonly observed in its offshoots: the vagueness doctrine as applied to penalties, Giaccio v. Pennsylvania, 382 U. S. 399 (1966); the lenity principle, Badner v. United States, 358 U. S. 169 (1958); 22/ and this Court's

20/ HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

21/ But see Robinson v. Kentucky, 384 U. S. 195 (1966).

22/ "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. [Citations omitted.] . . . 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Id. at 177-78.

adamant refusal to undertake either the judicial fashioning of criminal punishments, United States v. Evans, 333 U. S. 483 (1948), or the judicial fashioning of procedures for the imposition of criminal punishments, United States v. Jackson, 390 U. S. 570 (1968).[23] Under the rule of law guaranteed by Due Process, the creation of criminal sanctions is, quite simply, "no part of [judges'] . . . duties." United States v. Reese, 92 U. S. 214, 221 (1875).

The question here is whether the North Carolina Supreme Court has infringed that principle, or whether the state-law characterization of what was done in Waddell as a mere application of severability doctrine saves palpable judicial promulgation of the harshest penalty known to mankind[24] from the constitutional

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23/ "It is one thing to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

24/ See the opinion of Mr. Justice Sharp, dissenting in State v. Waddell, 282 N.C. 431, ___, 194 S.E.2d 19, 48 (1973):

> "This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary 'from death or life imprisonment in the discretion of the jury to mandatory death.'"

charge of lawlessness. The question is not, of course, whether four or three Justices of the North Carolina Supreme Court more nearly guessed what the North Carolina legislature might have wanted in the wake of Furman, in light of the fact that its last pronouncement on the subject -- a quarter-century old -- was long sealed together with the irremediable fates of those who had been chosen to live or to die under the discretionary sentencing regime for which it then unmistakably opted.[25/] Rather the question is whether judicial fiat, with nothing more than the profession of that kind of guesswork to connect it with the regular and accepted method of providing by law for the punishment of crimes, can withstand scrutiny under federal constitutional guarantees designed as limitations upon the lawless exaction of overbearing and unauthorized criminal penalties.

25/ State v. Waddell, 282 N.C. 431, ____, 194 S.E. 2d 19, 26 (1973); State v. Mathis, 236 N.C. 508, 53 S.E.2d 666 (1949); and see note 12, supra.

C. The Perpetuation of Arbitrary Discretion in the Selection of Those Who Must Die.

The third issue presented is whether the capital trial procedure approved for North Carolina by the Waddell decision violates Furman's prohibition of arbitrary selectivity in the administration of the death penalty. Although the prevailing opinions in Furman differ somewhat regarding the questions left unanswered by the Furman holding, they all condemn at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic selective processes.[26] The form of those

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[26] The concurring Furman opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-374) shared the view that the death penalty is unconstitutional per se, regardless of the presence or absence of discretion in the procedural system whereby it is applied.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional," 408 U.S. at 257, but held the death sentences under review in Furman and companion cases unconstitutional under the Eighth and Fourteenth Amendments because they were the result of a procedure which discriminated against certain defendants upon the basis of "race, religion, wealth, social position [and] class" and which "[gave] room for the play of such prejudices." 408 U.S. at 242.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question [whether "the infliction of the death penalty is constitutionally impermissible in all circumstances"], 408 U.S. at 306, since he found that the death sentences under review were "wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore in violation of the Eighth and Fourteenth Amendments. "[O]f all the people convicted of rapes and murders . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote omitted).

Mr. Justice White declined to consider the question of whether "the death penalty is unconstitutional per se," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

processes can hardly be thought constitutionally dispositive. See Commonwealth v. A Juvenile, 1973 Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[27] What is important is their result: a lawless and capricious dispensation of life and death, in which death sentences are "freakishly imposed." Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring).

In considering whether the Waddell procedures comply with Furman or whether the North Carolina Supreme Court has merely displaced the focus, lowered the visibility, diffused the responsibility, and thereby increased the predictable arbitrariness and discrimination of persisting discretionary processes for the administration of the death penalty,[28] this Court will

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27/ In this case, the Supreme Judicial Court of Massachusetts ruled that Furman invalidated a death sentence under a "mandatory" death penalty statute, if arbitrary procedures made it possible for some defendants to escape being subjected to the extreme punishment. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was "mandatory" under Mass. Gen. Laws Ann. c.265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since Furman invalidated "discretionary imposition of the death sentence," 300 N.E. 2d at 443 (emphasis in original), regardless of where in the process this discretion was lodged.

28/ The discretion which is concealed but inevitable in a purportedly "mandatory" death-sentencing system is likely to be influenced by impermissible considerations to at least as great an extent as the visible discretion that Furman found unconstitutional. North Carolina's experience with a "mandatory" statute prior to 1949 reflects this point. Between 1910 and 1949, 75% of all persons received under sentence of death were non-white; between 1950 and 1972, 63% of those so received were non-white. Similarly, 80% of persons executed under the pre-1949 "mandatory" system were non-white; 73% of executions under the post-1949 "discretionary" system were of non-whites. (Data compiled from BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3, (North Carolina Office of Corrections, September

want to consider the following characteristics, among others, of North Carolina law and practice:

28/ cont'd.

1973)). It appears that under the "mandatory" system created by the Waddell decision similar forces are at work: as of June 1, 1974, 24 of the 34 defendants condemned to die for crimes committed between January 18, 1973 (the date of Waddell) and April 8, 1974 (the effective date of the new North Carolina capital punishment statute) or 71%, are non-white, approximately the percentage of those condemned to die who were non-white under the pre-Furman "mandatory" system. Death sentences have been affirmed or imposed under the Waddell procedures in the following cases:

State v. Jacobs, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E.2d 786 (April 30, 1974); State v. Monk, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Britt, Robeson County Superior Ct., No. 73-Cr-6567 (September 6, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 36 (Robeson) (May 15, 1974); State v. Spicer, New Hanover County Superior Ct., No. 73-Cr-8054 (September 12, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 25 (Hanover) (May 15, 1974); State v. Ward, Edgecombe County Superior Ct., No. 73-Cr-6796 (September 19, 1973); State v. Fowler, ___ N.C. ___, 203 S.E.2d 803 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Bell, Robeson County Superior Ct., No. 73-Cr-12351 (October 18, 1973); State v. Sparks, Guilford County Superior Ct., No. 73-Cr-19776 (November 1, 1973); State v. Anthony Carey, Mecklenburg County Superior Ct., No. 73-Cr-40179 (November 8, 1973); State v. White, Alamance County Superior Ct., No. 73-Cr-12972 (December 6, 1973); State v. Brown, Edgecombe County Superior Ct., No. 72-Cr-7238 (December 9, 1973); State v. Hines, Edgecombe County Superior Ct., No. 73-Cr-7239 (December 9, 1973); State v. Walston, Edgecombe County Superior Ct., No. 73-Cr-7378 (December 9, 1973); State v. Albert Carey, Mecklenburg County Superior Ct., No. 73-Cr-6158 (December 11, 1973); State v. Vick, Beaufort County Superior Ct., No. 73-Cr-5687 (December 12, 1973); State v. Lampkins, Forsyth County Superior Ct., No. 73-Cr-43023 (January 19, 1974); State v. Pruitt, Cumberland County Superior Ct., Nos. 73-Cr-35545, 35546 and 35548 (January 29, 1974); State v. Williams, Wake County Superior Ct., No. 73-Cr-32521 (January 31, 1974); State v. Woods, Catawba County Superior Ct., Nos. 73-Cr-20546 and 20545 (January 28, 1974); State v. Patterson, Forsyth County Superior Ct., No. 73-Cr-22457 (February 5, 1974); State v. McCall, Transylvania County Superior Ct., Nos. 73-Cr-1828 and 1829 (February 9, 1974); State v. Avery, Bertie County Superior Ct., No. 73-Cr-2247 (February 17, 1974);

[20b]

1. Prosecutorial Discretion.

In North Carolina, the Solicitor is charged with the duty to "prepare the trial dockets [and] prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district." N.C. Gen. Stat. §7A-61 (1971 Cum. Supp.). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953), including not only absolute discretion whether and what to charge, but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment, State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971); and see State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951). The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is State v. Carey, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that

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28/ cont'd.

State v. McLaughlin, Robeson County Superior Ct., Nos. 73-Cr-18024, 74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231, 74-Cr-232 (February 28, 1974); State v. Burns, Onslow County Superior Ct., No. 74-Cr-1012 (March 1, 1974);

there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The Court rejected this contention, commenting that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And the majority opinion in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that either the Eighth or the Fourteenth Amendment required any limitation of the unfettered discretion of the Solicitor: "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

Without any guidance whatsoever, then, a Solicitor is free to make the decision whether an indictment will be sought for first or second degree murder, for rape or assault to rape. He may thus "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, at 314 (Mr. Justice White concurring). This prosecutorial discretion doubtless accounts in considerable part for the striking fact, for example, that there have been only two convictions[29] for

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29/ State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E.2d 786 (April 10, 1974). State v. Henderson, Alamance County Superior Ct., No. 73-Cr-7771 (September 5, 1973), aff'd 285 N.C. 1, 203 S.E.2d 10 (March 13, 1974), petition for cert. filed, June, 1974 (No. 73-). The petitioner in Henderson was also convicted and sentenced to die for the crime of rape.

first degree burglary during the past year of Waddell's implementation in a State where there were about forty convictions annually for this crime in the recent past,[30] and where 39,210 "burglaries and housebreakings" were reported in 1972.[31] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions despite clear evidence of this crime.

A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under the regime of Waddell. In State v. Spicer, N.C. Sup. Ct., No. 25 (New Hanover), decided May 15, 1974, two persons were tried and convicted for murder during the course of an armed robbery.[32] A third person, one Brailford, had helped plan the

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30/ In 1955, the North Carolina Department of Justice ceased keeping separate statistics for persons convicted of First Degree Burglary and Second Degree Burglary. The Biennial Report of the Attorney General, Vol. 32 at 515, reveals that in 1952, there were 47 convictions for First Degree Burglary (with 13 "Other Dispositions" of First Degree Burglary charges); in 1953, there were 33 convictions for this crime, with 10 "Other Dispositions," ibid.; in 1954, there were 35 convictions and 26 "Other Dispositions," ibid., Vol. 33 at 377.

31/ FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1972 (Aug. 1973) at 74. The FBI Uniform Crime Report statistics reflect reported crimes, not convictions, and the reported "Burglaries and housebreakings" are not necessarily equivalent to the total number of statutory First Degree Burglaries which occurred in the State during 1972.

32/ The conviction of Isaac Monk, also found guilty of first degree murder and sentenced to death in this incident, is pending on appeal in the North Carolina Supreme Court. Monk v. State, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973).

robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." Id., slip op. at 9. The Court thus described Brailford's role in the crime:

> "[T]he State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated that he expected his cut . . . . The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Id., supra, at 10-11.

2. Plea Bargaining.

Under the Waddell procedures, there is no limit on the power of a Solicitor to accept a plea of guilty to a lesser included offense by a defendant charged with a capital crime, or to nol pros a capital indictment entirely. It is unclear how much plea bargaining in capital cases occurs in North Carolina,[33] but the critical point is that it is utterly unregulated: the discretion of a Solicitor to accept a plea to a lesser offense in a capital case being quite as untrammelled as the freedom of a jury to recommend mercy in a pre-Waddell capital case. One instance of that discretion is State v. Wiggins, Nortie County Superior Ct., No. 73-Cr-2283, in which a 14 year old defendant was indicted for the rape of a nine year old girl, a potentially capital offense. On February 19, 1974, the defendant was permitted to enter a guilty plea to charges of assault with intent to rape and of assault with intent to kill, and received sentences of fifteen years and five years.

33/ Guilty pleas are said to account for up to 90% of all criminal convictions in the United States. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

Such cases doubtless reflect the long-recognized function of plea bargaining under a purportedly "mandatory" sentencing statute: it "provides the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[34/]

34/ Heath, "Plea Bargaining -- Justice Off the Record," 9 WASHBURN U.L. REV. 430, 455 (1970).

[2nd]

3. Jury Discretion

Even when a North Carolina jury has no admitted sentencing discretion, it still retains power to spare a capital defendant's life by finding him guilty of a lesser included offense. If there is any evidence to support the finding of such an offense, a defendant may demand a lesser-included-offense instruction as a matter of right.[35] N.C. Gen. Stat. §15-170 provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of any attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime . . . ."

35/ "If . . . there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." State v. Knight, 284 N.C. 386, 391, 103 S.E.2d 452, 456 (1958) (quoting State v. Quincy, 151 N. C. 676, 686, 65 S.E. 995, 999 (1909)); State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, State v. Hicks, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); State v. Dubose, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Foster, 279 N.C. 573, 184 S.E.2d 289 (1971); State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971); State v. Brown, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); State v. Cox, 201 N.C. 357, 360 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime. State v. Keen, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955); State v. Ballenger, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Satterfield, 207 N.C. 118, 176 S.E. 456 (1934). However, if such a charge is given and if a defendant is convicted of the lesser included offense, the conviction will nevertheless be affirmed on appeal, even if it appears irrational on the facts of the case. See State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), and discussion, infra.

And N.C. Gen. Stat. § 15-169 provides that:

> "[o]n the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

The right to a lesser-included-offense charged is considered so important in North Carolina that its omission is held to be reversible error even when the defendant fails to request such a charge. State v. Wagoner, 249 N.C. 637, 107 S.E.2d 63 (1959); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970). See State v. Moore, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); State v. McCraffenreid, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). The Supreme Court of North Carolina has frequently reversed convictions for capital offenses [35/] because the trial court failed to give a charge on second degree murder, [37/] voluntary

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36/ The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," State v. Don Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

37/ State v. Revenge, 195 N.C. 552, 143 S.E. 187 (1928); State v. Perry, 209 N.C. 606, 184 S.E. 545 (1936); State v. Gaunt, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Knight, 264 N.C. 384, 103 S.E.2d 452 (1958). When the State attempts to prove "Willful, deliberate and premeditated killing," N.C. Gen. Stat. § 14-17, which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. § 15-172, and since 'the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant.' State v. Todd, 264 N.C. 524, 529, 142 S.E.2d 154, 158 (1965). See also, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

manslaughter,[38] or involuntary manslaughter[39] in first degree murder cases, or because it failed to charge on assault with intent to rape in rape cases.[40]

Moreover, a jury may be charged on a lesser included offense where there is no evidence to support such a charge, and a conviction for the lesser offense will be sustained on appeal.[41]

38/ State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916); State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924); State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959). Cf. State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

39/ State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971). Cf. State v. Benny Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

40/ State v. Williams, 185 N.C. 655, 116 S.E. 730 (1923). See also, Hunt v. Bass, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Lew, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Webb, 20 N.C. App. 199, 200 S.E.2d 849 (1973). Cf. State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (Bobbitt, CJ, dissenting). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." State v. Green, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

41/ The Supreme Court of North Carolina has occasionally disapproved of this practice, State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); State v. Allen, 278 N.C. 115, 181 S.E.2d 453, 457 (1971); State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917). In State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In State v. Quick, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first-degree murder case had been proper:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him." 42/

42/ "An error on the side of mercy is not reversible . . . ." State v. Fowler, 153 N.C. 734, 68 S.E. 567 (1909). Accord: State v. Rose, 155 N.C. 436, 71 S.E. 322, 337 (1911); See also State v. Ratcliff, 199 N.C. 9, 153 S.E. 605, 606 (1930); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

In State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then . . . [and] [w]hen they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

To insure that the jury is aware of the consequences of its decision in a capital case, the Supreme Court of North Carolina recently ruled that if "the jury is confused or uncertain as to whether one of its permissive [sic] would result in a mandatory death sentence . . . sufficient compelling reason exists to justify . . . informing the jury of the consequences of their possible verdicts." State v. Britt, N.C.Sup.Ct., No. 36 (Robeson), decided May 15, 1974, [Appendix D, infra] slip op. at 16. The Court also ruled that "[c]ounsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged . . . .[he may] in his argument to the jury . . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." Id. at 17-18. This holding implements the power of the jury to avoid imposing the death penalty in a

sympathetic case, either by convicting of a lesser included offense or by returning a verdict of not guilty.[43/] Thus, under North Carolina law, a double level of discretion may affect the jury's choice of a life or death verdict in a case where all the evidence points to guilt of a capital offense or of nothing: the trial judge has discretion to submit such lesser offenses, and the jury has discretion to commit for them.

43/ Wicker, "Christmas on the New Death Row," New York Times, Dec. 25, 1973, p. 18, col. 1:

> "Raleigh, N.C. Dec. 24 . . . In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; . . . Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

4. Executive Clemency.

The North Carolina Constitution provides that:

> [T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. Article III, §5(6).

Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of two hundred-thirty-five (235) of three hundred fifty-eight (358) condemned prisoners were commuted. The chief executive has thereby commuted 65.6 percent of the death sentences imposed in the State over a sixty-year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature the right to prescribe the "manner of applying for pardons" but leaves the grant or denial subject only to "such conditions as [the Governor] may think proper." Indeed, the Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> [i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

Under a procedural system in which the death penalty is purportedly "mandatory," the clemency authority has commonly functioned as the aspect of the criminal-justice system that responds to "mitigating factors" -- factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the exaction of punishment. 44/ A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations or death sentences after the 1947 and 1949 statutory amendments giving juries the option of imposing life sentences for the four crimes which had theretofore carried mandatory death penalties. 45/ By withdrawing that option from juries in 1973, the Waddell decision obviously displaced, but equally obviously did not reduce, the operation of discretionary selectivity in North Carolina's death-sentencing practices.

44/ Note, Executive Clemency in Capital Cases, 39 N.Y.U.L.REV. 136, 165-166 (1964).

45/ Johnson, Selective Factors in Capital Punishment, 36 SOCIAL FORCES, 165, 166-7 (1957). Bedau notes that while 64 percent of condemned persons escaped execution between 1910 and 1945, the percentage of those escaping execution dropped to 38 percent for the period between 1945 and 1962. Undoubtedly, a large proportion of condemned persons who avoided the death penalty did so by commutation. BEDAU, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3. (North Carolina Office of Corrections, September 1973).

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibition of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of heavy criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 329-330 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," drawn upon advanced medical science and sciences of human behavior, We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher" 46/ even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'" 47/ While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments, a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders. 48/

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after unutterable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "the objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and unknown or outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

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ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.

The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 2,859 persons executed under civil authority in the United States between 1930 and 1958, only 191 were executed during the 1960's and only 25 were executed after 1962. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

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death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the state of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third, The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a social development which has produced an increased respect for life and a concomitant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution. 52/ Increased respect for

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51/ (Cont'd,

forbids public executions. Moratorium to Abolish the Death Penalty in the United States, 284 ANNALS 126, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Then executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and achingly possibility that human error or a denial of due process could send a man to his death. 53/

The morality of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man. Modern legal systems which postpone execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).

The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkcom, 339 U. S. 9, 17 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological decompensation.

Moreover, existing data suggests what imagination invites: there is likely to be unbearable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an painless and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of executing and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society."[54/]

54/ Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

Appendix C

Pp. 72-78, Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975).

the accused of a jury that is "truly representative of the community," Smith v. Texas, supra; see Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970) -- is violative of petitioner's right to equal protection and due process.

C. The Exclusion of a Venireman with Conscientious Scruples Against Capital Punishment Deprived Petitioner of his Sixth Amendment Right to a Representative Jury.

This case also presents the significant constitutional question whether any death qualification of a jury is permissible in the wake of the incorporation of the Sixth Amendment's jury-trial guarantee into the Fourteenth. The Witherspoon decision was handed down only a few days after Duncan v. Louisiana, 391 U.S. 145 (1968); Witherspoon's trial, of course, long pre-dated Duncan; and the cases in which the Court has since applied Witherspoon have all been pre-Duncan cases or cases in which no Sixth Amendment challenge to the practice of death qualification was made. See Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); and the twenty-three cases reversed on authority of Witherspoon in 403 U.S. at 946-948 (1971). Prior to the effective date of Duncan (see DeStefano v. Woods, 392 U.S. 631 (1968)), the only federal constitutional rights enjoyed by a state criminal defendant in connection with the selection of his trial jury were those vouchsafed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court had then recognized the obligation of the States not to exclude racial minority groups from the petit jury, see Smith v. Texas, 311 U.S. 128 (1940);

Hernandez v. Texas, 347 U.S. 475 (1954), but had not yet imposed upon state criminal trials the more exacting obligations of the Sixth Amendment. Compare Hoyt v. Florida, 368 U.S. 57 (1961), with Taylor v. Louisiana, 43 U.S.L.W. 4167 (U.S., Jan. 21, 1975).

Since Duncan, however, the Court has recognized that the Sixth Amendment guarantee of jury trial entitles a state criminal defendant to "a petit jury [drawn] from a representative cross section of the community." Taylor v. Louisiana, supra, 43 U.S.L.W. at 4169. In Taylor -- which marks only the latest exemplification of this principle[66/] -- the Court held that a male criminal

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66/ Between the dates of Duncan and Taylor, the Court clearly said several times that the selection of petit jurors from a representative cross section of the community was an essential requirement of the Sixth Amendment. In Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970), the Court suggested that such a requirement was imposed upon the States by Duncan, stating that the "very idea of a jury" was that of a "'body truly representative of the community'" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) and that jury lists must "'reasonably reflect a cross-section of the population,'" 396 U.S. at 332 (quoting Brown v. Allen, 344 U.S. 443, 474 (1953)). See also Williams v. Florida, 399 U.S. 78, 100 (1970); Apodaca v. Oregon, 406 U.S. 404, 410 (1972); and see Peters v. Kiff, 407 U.S. 493, 502-504 (1972) (opinion of Mr. Justice Marshall).

defendant had standing to contest the exclusion of women from his trial jury without the necessity of demonstrating any specific prejudice because the exclusion of a distinctive population group "deprived him of the kind of fact finder to which he was constitutionally entitled." Id. at 4168. 67/

67/ "We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . . The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

Taylor v. Louisiana, supra, 43 U.S.L.W. at 4170.

As the Court has progressively clarified the nature of the "jury" guaranteed in state criminal proceedings by the Sixth Amendment, the cross section requirement has become increasingly essential and the permissibility of death qualification has therefore become increasingly suspect. Williams v. Florida, 399 U.S. 78 (1970), held that a jury of twelve was not an indispensable part of the Sixth Amendment right: all the Sixth Amendment required was that the jury be large enough "to provide a fair possibility for obtaining a representative cross-section of the community . . . " Id. at 100. This was so because the critical function of the jury was to provide a citizen group, representative of the community, which would serve to check possible Government oppression of criminal defendants. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." Ibid. In Apodaca v. Oregon, 406 U.S. 404, 410 (1972), the Court similarly ruled that the Sixth Amendment did not require conviction by unanimous verdict in State criminal cases, since the jury's function could be served without unanimity "as long as it consists of a group of laymen representative of a cross section of the community."

The principle that no identifiable group may be systematically excluded from jury panels is not limited to groups defined by race, of course. See Taylor v. Louisiana, supra;

White v. Crook, 251 F. Supp. 401, 408-409 (M.D. Ala. 1966) (exclusion of women); Labat v. Bennett, 365 F.2d 698 (CA5 1966), cert. denied, 386 U.S. 991 (1967) (exclusion of wage earners); State v. Schowgurow, 240 Md. 121, 213 A.2d 475 (1965) (exclusion of agnostics and atheists).

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Hernandez v. Texas, 347 U.S. 475, 478 (1954). As the Court reiterated in Apodaca v. Oregon, supra, 406 U.S. at 413, the Sixth Amendment forbids "systematic exclusion of identifiable segments of the community from jury panels," because all groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined." And the Court plainly recognized in Witherspoon that jurors with scruples against the imposition of the death penalty form a distinctive, coherent and sizeable group in most communities from which juries are selected.[68/]

68/ See also, e.g., Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. COL. L. REV. 1 (1970); Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 STAN. L. REV. 1245 (1974).

Since a venireman was excluded from petitioner's post-Duncan trial jury on the sole ground of her conscientious scruples against the death penalty, the issue is presented here whether such an exclusion may be justified under the exacting standards of the Sixth Amendment. Admittedly, a defendant cannot object under the Sixth Amendment to the exclusion for cause of veniremen who are related to him or who have a monetary interest in the outcome of his suit, because of the danger that such veniremen, if selected as jurors, would bring to the jury's deliberations attitudes that are inconsistent with their proper duty as jurors to determine the truth impartially. Under a statutory scheme like Florida's,however, it is the rightful duty of the jury to express community attitudes about punishment: "one of the most important functions any jury can perform [in the administration of such a statute] . . . . . is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra, at 520 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Indeed, the Florida capital punishment statute implicitly contemplates the expression of a broad range of community sentiment regarding punishment, since it provides for a recommendation of sentence by a "majority of the jury," Fla. Stat. §921.141(3), and allows the trial judge to overrule this "recommendation," ibid. It would thus have been impossible for Venireman Miller to have "hung" the jury on the issue of sentence (assuming even that she

adamantly refused to vote in favor of the death sentence -- an assumption not justified by the voir dire record, see pp. 61-67, supra); and the vote of a majority of the jury to recommend life imprisonment would itself not have precluded the trial judge's imposition of a death sentence.[69/] The Court should determine, therefore, whether in this setting a criminal defendant is entitled by the Sixth Amendment to a jury panel which reflects a fair cross section of community sentiment -- a panel from which veniremen such as Mrs. Miller cannot be excluded for cause simply on account of their views regarding capital punishment.

69/ Jury recommendations of mercy have not forestalled the imposition of the death sentence in at least 16 cases. See note 13, supra.